SUPREME COURT, U. S.

In the Supreme Court of the United States

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FILED
NOV 22 1967
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. and FRED P. MORRISSEY, as Members thereof,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

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Jurisdictional Statement

OPINION BELOW

The opinion of the District Court for the Northern District of California was issued on May 23, 1967 and is

reported at 268 Federal Supplement 836. A copy of said opinion, which includes the Court's findings of fact and conclusions of law, and the Court's Judgment and Order filed September 7, 1967 are printed in Appendix A, *infra*.

JURISDICTION

1. The ground upon which jurisdiction of this Court is invoked is that this is an appeal from the judgment of a three-judge District Court of the United States (convened pursuant to 28 U.S.C. 2281) in three consolidated actions seeking a declaration that sections 3664, 3667 and 4013 of the Public Utilities Code of the State of California are unconstitutional and void as applied to interstate commerce, and requesting injunctive relief restraining the Public Utilities Commission of the State of California from taking any action under said statutes.

2. The date of entry of the judgment sought to be reviewed is September 7, 1967. There was no petition, application or request for rehearing. A Notice of Appeal to the Court of Appeals, Ninth Judicial Circuit, was filed in the United States District Court, Northern District of California, on September 29, 1967. A Notice of Appeal to this Court was filed in the United States District Court, Northern District of California on September 29, 1967.

3. The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. 1253.

4. Cases believed to sustain that jurisdiction are: *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Campbell v. Husey*, 368 U.S. 297 (1961); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Public Utilities Commission of California v. United Air Lines*, 346 U.S. 402 (1953).

STATUTES INVOLVED

The State statutory provisions in question are sections 3664, 3667 and 4013 of the California Public Utilities Code (Cal. Stats. 1951, c. 764, pp. 2118, 2119 and 2129). They are set forth below. Additional sections of the California Public Utilities Code involved are set forth in Appendix "B".

"3664. It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

"3667. No highway permit carrier shall charge, demand, collect or receive for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges or greater than the maximum rates and charges applicable to such transportation established or approved by the commission; nor shall any such carrier directly or indirectly pay any commission or refund, or remit in any manner or by any device any portion of the rates or charges so specified, except upon authority of the Commission."

"4013. It is unlawful for any carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article."

The following portions of the Constitution of the United States are also involved:

ARTICLE I

Section 8. The Congress shall have Power . . .

[Cl. 3] to regulate commerce with foreign nations, and among the several states and with the Indian Tribes;

ARTICLE VI

[par. 2] This Constitution and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal statutes, viz. the Interstate Commerce Act, as set forth in Appendix "C" in pertinent part, are also involved.

QUESTIONS PRESENTED

A. Did Congress intend, by the enactment of Parts II (49 U.S.C. 301-327) and IV (49 U.S.C. 1001-1022) of the Interstate Commerce Act, to preclude the States from economic regulation of interstate transportation performed by motor carriers for nonprofit shippers associations wholly within "commercial zones"?[1]

B. Does the application of California's minimum rates to interstate transportation performed by motor carriers for nonprofit shipper associations wholly within "commer-

1. "Commercial zone" is the term used by the Interstate Commerce Commission to designate the area exempted from Federal regulation by 49 U.S.C. 303(b)(8).

cial zones" impose an unreasonable burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States?

STATEMENT OF THE CASE

Appellants (hereinafter referred to as the "Commission") are a body duly constituted, with its jurisdiction prescribed by the Constitution and Statutes of the State of California for the purpose, among others, of regulating the intrastate rates, and interstate rates when permitted under the Constitution and laws of the United States, of commercial carriers of property between points in the State of California.

Background

The Commission has prescribed, and applied, minimum rates for the transportation of property in local drayage, among other areas, since 1935. The application of these rates to interstate commerce moving wholly within San Francisco was challenged in 1940. (*In re Consolidated Freightways, Inc.*, 42 Cal. P.U.C. 721. Rev. den. Cal. Supreme Court, SF No. 1648, Injunction den. 36 F.Supp. 269, cert. den. 313 U.S. 561, reh. den. 313 U.S. 599 (1941)). The Commission determined that local distribution within San Francisco of interstate traffic was exempt from regulation by the Interstate Commerce Commission by virtue of 49 U.S.C. 303(b)(8), which exempts from federal regulation, except for qualifications, hours of service, safety of operations, and such transportation as is under a "common control, management, or arrangement for a continuous carriage," transportation wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities. Based on this determination, and the propo-

sition that where the federal government has not acted with respect to interstate commerce the state may do so if the matter is of local concern not requiring uniformity, the Commission concluded that the transportation in question was subject to the minimum rates prescribed by it and ordered the respondent to cease and desist from charging less than said minimum rates.

In 1949, after an investigation and formal hearing into the operations and practices of appellee Worth, the Commission ordered Worth to cease and desist from charging less than the minimum rates for the distribution, within San Francisco, of interstate pool car shipments. (Decision No. 42878, Case No. 5001, 48 Cal.P.U.C. 681.) Thereafter Worth complied with the Commission's order until 1961, when it filed an assembly and distribution tariff with the Interstate Commerce Commission under the permissive authority of 49 U.S.C. 1008, and began assessing the rates contained therein which are lower than the minimum rates. At or about this time other carriers filed assembly and distribution tariffs with the Interstate Commerce Commission and began assessing the rates and charges therein. These rates were also lower than the minimum rates prescribed by the California Commission for transportation of interstate traffic wholly within exempt commercial zones.

Facts Precipitating the Actions

On December 27, 1965, the Commission's staff sent a letter to a carrier distributing interstate shipments in the Los Angeles Commercial Zone for appellee Baltimore Shippers and Receivers Association, Inc., directing that carrier to cease and desist from charging less than the Commission's minimum rates for its services and to collect the undercharges pointed out in the attachment to the letter.

On March 22, 1966, the Commission issued its Order Reopening Investigation in Case No. 5001 to determine whether appellee Worth was violating the Commission's order of 1949.

On March 17, 1966, Case No. 8414, the Commission issued its Order Instituting Investigation of appellee G. I. Trucking Company to determine whether appellee was charging less than the minimum rates for transportation services in the distribution of property moving in interstate commerce within the Los Angeles Commercial Zone for shipper associations.

On March 17, 1966, in Case No. 8415, the Commission issued its Order Instituting Investigation of appellee Redway Truck and Warehouse Company for the same purpose noted for appellee G. I. Trucking Company.

The Complaints

On May 6, 1966, appellees Baltimore Shippers and Receivers Association, Inc., et al., filed a Complaint for Declaratory Judgment and Injunction and An Application for Three-Judge Court in the United States District Court, Northern Division of California. A Motion for Preliminary Injunction was filed the same day.

On May 19, 1966, appellees Charles J. Worth Drayage Company and Los Angeles Wholesale Institute filed a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, Declaratory Judgment, and Application for Three-Judge Court in the United States District Court, Northern Division of California. A Notice of Motion for Temporary Restraining Order and Motion for Consolidation was filed the same day.

On August 26, 1966, appellees G. I. Trucking Company and Redway Truck and Warehouse Company filed a Com-

plaint for Permanent Injunction, Declaratory Judgment, and Application for Three-Judge Court in the United States District Court, Northern Division of California.

Summary of Complaints

The plaintiffs (appellees) Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., United Shippers Associates, Inc., and Los Angeles Wholesale Institute are nonprofit associations of shippers as defined in 49 U.S.C. 1002(c) who ship freight in interstate commerce throughout the United States.

Plaintiffs (appellees) Charles J. Worth Drayage Company, G. I. Trucking Company and Redway Truck and Warehouse Company are motor carriers situated in California who perform break-bulk (the breaking up of a consolidated shipment into its component parts) and distribution services in California for nonprofit shipper associations, as well as general intrastate transportation services.

The shipper associations allege that the exemption in 49 U.S.C. 303(b)(8) means freedom from federal and state economic regulation.[2]

The motor carriers, on the other hand, allege that the above exemption applies in an alternative form, viz., that their operations wholly within commercial zones are subject to no economic regulation by express mandate of Congress, or, in the alternative, that their operations are subject only to the economic regulation of the Interstate Commerce Commission.

All plaintiffs (appellees) allege that California's scheme of regulation cannot constitutionally be applied to their

2. The term "economic regulation" is understood to refer to regulation of matters other than safety.

businesses because such application would regulate and control interstate commerce, thus creating a burden on interstate commerce and therefore would be in excess of the power of the State of California by reason of Article I, Section 8, of the Constitution of the United States; that Congress has preempted and occupied the field of economic regulation of interstate motor transportation of property and the action of the Commission is thus inconsistent by reason of Article VI, Paragraph 2, of the Constitution of the United States, and that the Commission's action violates Amendment XIV, Section 1, to the Constitution of the United States in that plaintiffs (appellees) will be deprived of their property without due process of law and denied equal protection of the law.

Relief Sought

All plaintiffs (appellees) in the above actions sought a declaration that Congress had preempted the field of regulation of interstate commerce by motor carriers through the comprehensive scheme of regulation contained in the Interstate Commerce Act (49 U.S.C. 301-327); that the imposition of California's minimum rates to the distribution services performed by motor carriers for appellee shipper associations wholly within commercial zones in California constitutes an unreasonable burden on interstate commerce in violation of the commerce clause of the Constitution of the United States; deprives plaintiffs of their property without due process of law and denies equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States; and requested that the Commission be permanently enjoined from applying and enforcing its minimum rates to said transportation.

Proceedings in the District Court

A hearing was held on May 31, 1966, on the Motions for a Temporary Restraining Order and Consolidation. No action was taken on the Motion for Temporary Restraining Order because such order became unnecessary after the Commission voluntarily took off its calendar the Orders Instituting Investigation of the appellee motor carriers. The cases were consolidated for trial.

On September 1, 1966, the Commission filed its Notice of Motion and Motion for Stay of Proceedings. This motion was made upon the grounds that a complaint had been filed before the Interstate Commerce Commission, the result of which could make the proceedings moot. The complaint was entitled *Shippers and Receivers Cooperative Association, Inc. v. G. I. Trucking Company*, Docket No. MC-C-34766. The complaint sought to prevent G. I. Trucking Company (appellee) from applying rates established by the California Commission to the distribution of plaintiff's traffic within the Los Angeles Commercial Zone.

The motion was heard and denied on September 16, 1966. The complaint to the Interstate Commerce Commission was dismissed by the plaintiff therein after the U.S. District Court filed its May 23, 1967 Opinion and Order.

On September 9, 1966, a pre-trial conference was held, wherein its was directed that counsel prepare a joint pre-trial order. The Joint Pre-Trial Order in Consolidated Cases was filed on December 19, 1966.

Trial commenced April 17, 1967 and continued through April 24, 1967. The District Court's Order Granting Permanent Injunction was issued and filed on May 23, 1967. On June 2, 1967 the District Court filed and entered an addendum to its Order directing plaintiffs (appellees) to prepare

an appropriate form of judgment consonant with the rulings of the court. A proposed order and objections thereto were considered. The Court thereafter, on September 7, 1967, filed and entered its final judgment.

Summary of Findings of Fact and Conclusions of Law by the District Court

The court included its findings of fact and conclusions of law in its 20-page opinion and order of May 23, 1967. In substance, the court found that Congress had preempted the field of economic regulation of interstate commerce for shipper association traffic transported by motor carriers wholly within commercial zones, and that the imposition of California's minimum rates upon this transportation constituted an unreasonable burden upon interstate commerce.

The court found that the nature of the regulation is economic regulation of interstate commerce which is not, practically speaking, capable of concurrent administration by both the state and federal governments. The court found that the legislative history with respect to the exemption of commercial zones in 49 U.S.C. 303(b)(8) was inconclusive and turned to the statute itself. The court found that the statute unambiguously exempts transportation wholly within commercial zones from federal regulation, but does not specifically spell out whether or not state regulation is envisioned or permitted.

The court found support for its conclusion that state regulation of the exempted transportation is precluded in *State Corporation Comm. v. Bartlett*, 338 F.2d 495 (10th Cir. 1964), Cert. den. 380 U.S. 964. In *Bartlett* the court held that the exemption of agricultural commodities in 49 U.S.C. 303(b)(6) preempted state regulation.

The District Court disagreed with the Commission's position that the legislative history exempting agricultural commodities from regulation clearly established the intent of Congress to leave transportation of agricultural commodities free from regulation, for the reason that *Bartlett* appeared to distinguish between rate regulation and other types of regulation practiced by the states. It found that rate regulation had commercial aims and thus was not as high on the scale of interests that the states could protect under the police power.

The court also relied upon *Railroad Transfer Service, Inc. v. Chicago*, 386 U.S. 351 (1967), to find that the Commission's argument that regulation by the State can be justified as a protection against destructive competition was without merit.

The Court found further support for its finding of preemption in the Freight Forwarder Act (Part IV of the Interstate Commerce Act, 49 U.S.C. 1001-1022). It found that the states are directly prohibited from regulating motor carriers performing distribution services for freight forwarders (49 U.S.C. 302(c)(2).) The Court found that the functions performed by freight forwarders and shipper associations are nearly identical with the exception of profit motive and service to the general public. The Court then looked to the exemption of shipper associations (49 U.S.C. 1002(c)(1)), and to the authority granted common carriers to file assembly and distribution tariffs for freight forwarders and others similarly situated (49 U.S.C. 1008), and found "that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carrier Act, Cf. *State Corporations Comm. v. Bartlett, supra,* and the Freight Forwarder Act and the nature of the subject

matter sought to be regulated required a finding that the field has been preempted by federal regulation." The Court expressly declined to make a finding on the question whether the Motor Carrier Act alone preempts the field.

This finding was made not only in the three-judge capacity of the Court, but also the original district judge found individually that he reached the same conclusion with respect to preemption.

The Court, acting in its three-judge capacity, found that the constitutional question presented under the commerce clause was not insubstantial and proceeded to consider the issue.

The Court found that even absent preemption the scheme of rate regulation the Commission seeks to impose violates the Commerce Clause of the United States Constitution. U.S. Const., Art. I, Sec. 8.

The Court found that the Commission's minimum rates would increase delivery costs in the commercial zone by 24 percent to 95 percent, which would increase the total delivery costs of the nonprofit shipper associations by 12 percent to 15 percent, resulting in a substantial economic burden on commerce. The Court further supported its finding by determining there was a violation of the "long and short haul principle" and that the Commission's rate structure would result in an interference with the free flow of commerce. The Court then concluded that the imposition of the Commission's minimum rates amounts to an unreasonable and unconstitutional burden on interstate commerce.

The District Court's Judgment of September ., 1967 ordered that the Commission be permanently restrained and enjoined from publishing, asserting and enforcing minimum rates under the authority of the law of the State of California for motor transportation service by motor carriers within exempt commercial zones for plaintiff shipper associations.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial and require plenary consideration by this Court. The questions are:

> Did Congress intend, by the enactment of Parts II (49 U.S.C. 301-327) and IV (49 U.S.C. 1001-1022) of the Interstate Commerce Act, to preclude the States from economic regulation of interstate transportation performed by motor carriers for nonprofit shipper associations wholly within commercial zones?
>
> Does the application of California's minimum rates to interstate transportation performed by motor carriers for nonprofit shipper associations wholly within commercial zones impose an unreasonable burden on interstate commerce in violation of the commerce clause of the Constitution of the United States?

Plenary consideration is necessary for these reasons:

1. This appeal presents to this Court for the first time the determination of the meaning and effect of Section 303(b)(8) of the Interstate Commerce Act by which Congress exempted local transportation by motor carriers of passengers and property within municipalities from economic regulation by the Interstate Commerce Commission. The lower court declined to construe the section and left its meaning and effect clouded and uncertain. Construction of the section by this Court is necessary to settle and define the regulatory powers of the States over transportation excluded from regulation by the Interstate Commerce Commission.

2. This appeal presents the question whether the Commerce Clause prohibits the exercise of regulatory powers of the States with respect to local transportation which Congress has expressly excluded from federal regulation. This question affects regulation of local transportation of pas-

sengers and property in every city of every state in the nation. It affects not only the regulation of local cartage of freight, but also the regulation of taxicabs and bus lines operating to and from railroad depots, bus terminals, and airports. Whether States and cities may lawfully apply uniform, nondiscriminatory regulations to such local services is a question of national importance.

3. This appeal presents to the Court for the first time the determination of the effect on Section 303(b)(8) of the Interstate Commerce Act of the enactment of Sections 1002(c)(1) and 1008 thereof. The former is in Part II, enacted in 1935; the latter sections are in Part IV, enacted in 1942. The lower court found preemption by reading those provisions of Part II (Motor Carrier Act) and Part IV (Freight Forwarder Act) together. That reasoning leaves in doubt the meaning and effect of Section 303(b)(8). Did Sections 1002(c)(1) and 1008 amend Section 303(b)(8)?

4. This appeal presents to the Court for the first time the question of the status of a nonprofit shipper association under Section 1002(c)(1) of the Act. Is such an association a carrier, or a shipper? Does Section 1002(c)(1) define a class of freight forwarder and exempt it from regulation under the Act, or is the Section merely a precautionary admonition to avoid possible misconstruction of the definition of freight forwarders as applying to a group of shippers consolidating their shipments to take advantage of volume rates? Does Section 1002(c)(1) confer upon a group of shippers some preferred status not enjoyed by a single shipper? The lower court's decision is unclear on the answers to these questions.

5. The lower court misapplied the holding of this Court in *Railroad Transfer Service, Inc. v. Chicago, supra.* That case involved transfer service between railroads—a motor

carrier service clearly subject to regulation by the Interstate Commerce Commission, and not within the exemption of Section 303(b)(8). If *Railroad Transfer* had involved independent taxicab operations to and from the railroad depots instead of transfer service under contract with the railroads between their depots, the decision would have been parallel to this case.

6. The lower court misapplied the holding of the Tenth Circuit Court in *State Corporation Commission v. Bartlett, supra.* That case involved the exemption of agricultural commodities under Section 303(b)(6). The case on appeal involves an exemption of local transportation which is not performed under common control, management or other arrangement for the through interstate movement. The distinction was overlooked by the lower court. The confusion requires clarification by this court.

7. The effect of the lower court's decision is to upset and overturn a well established portion of California's regulatory program. Since the *Consolidated Freightways* case, discussed at page 6, supra, the Commission has for over 20 years, fairly and effectively regulated interstate transportation within exempt commercial zones. Such regulation is an integral part of California's comprehensive regulatory program and its removal from the Commission's jurisdiction will replace harmony and stability with disruption and confusion.

8. The striking down of State legislation is a serious matter. A State law may not be struck down on the mere showing that its administration affects interstate commerce in some way. *Head v. New Mexico Bd. of Examiners,* 370 U.S. 424, 429 (1963). State regulation of interstate commerce, based on the police power, which does not discriminate against interstate commerce or operate to disrupt

its required uniformity, may constitutionally stand. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960). The exemption in question [49 U.S.C. 303(b)(8)] is clearly directed to relieving the [Interstate Commerce] Commission of the burdensome and highly expensive task of regulating purely local cartage operations. *Verbeem v. United States,* 154 F. Supp. 431, 434, affmd. 356 U.S. 676 (1957).

The questions presented by this appeal are important to large segments of the carrier industry and users of carrier service, and to the state and local governments. Whether States are to be prohibited from applying uniform nondiscriminatory regulation to motor carriers engaged in purely local service in interstate commerce which Congress has expressly removed from regulation by the Interstate Commerce Commission, and which does not conflict with federal regulation, is a question that requires determination by this Court.

The District Court Erred in Finding Preemption

Legislative History

In its consideration of the preemption question, the lower court first found that the legislative history of Section 303(b)(8) is inconclusive as to Congressional intent. Appellants respectfully submit that the finding is in error.

As pointed out in footnote four (4) of the lower court's opinion, Senator Wheeler, who introduced the bill containing Section 303(b)(8), clearly intended State regulation of commercial zone transportation. Notwithstanding the statement quoted from the author of the exemption, the lower court relied on a general statement taken from the House debates, which dealt with the overall proposition of regulation generally.

The lower court's quotation from the House debates is taken out of context. The full context is set forth below.[3] Mr. Sadowski, in reporting on the bill to the Committee of the Whole House, stated:

> "Legislation over interstate motor carriers, to be practical, must conform with the principles of regulation now in effect in the 48 States which regulate common carriers, and the 42 States that regulate contract carriers. The State Commissions have asked Congress to pass this bill so that there may be harmony between States as to motor-carrier regulation." 79 Congressional Record Part 11, p. 12204.

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3. "The States, generally, prohibit the use of their highways to common-carrier vehicles unless a certificate of public convenience and necessity is obtained after hearing in accordance with statute. The authority of a State to grant or deny a citizen the use of the public highways as a place of business is recognized.

In the case of *Stephenson v. Binford* (287 U.S. 251, 264) it was held that—

> It is well-established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

In the case of *Buck v. Kuykendall* (267 U.S. 307) the court held that a State could not regulate motor carriers operating in interstate commerce, and that the matter of control of carriers in interstate commerce was entirely in the hands of Congress to provide for Federal regulation.

This decision left the door wide open. It permitted all sorts of abuses by irresponsible operators at the expense of the intrastate motor carriers and other transportation agencies who were under strict State and Federal regulation.

After considering all the data at hand and the recommendations of the Interstate Commerce Commission, the Coordinator, the carriers themselves, and the public interest to be served, the committee believes that the bill as reported supplies the best possible regulation to preserve an adequate highway transportation system properly adapted to the needs of the commerce of the United States." Remarks of Mr. Sadowski of Michigan in presenting the bill to Congress, 79 Congressional Record Part 11, p. 12206.

Mr. Holmes, a member of the sub-committee which considered the legislation (Motor Carrier Act), stated:

> "In the legislation here created it makes it possible for the Interstate Commerce Commission to cooperate with bodies organized in the States. The State utility commissioners already have machinery set up to care for intrastate regulation. It is the *intent and purpose* of the legislation to use the machinery of the State in connection with the regulation of that portion which enters into interstate commerce." 79 Congressional Record Part 11, p. 12213. (Emphasis added.)

Thus it becomes clear that the House debate does not render Congressional intent inconclusive, but, rather it shows that Congress intended regulation by the States in exempt commercial zone areas.

Not only does the legislative history show a Congressional intent to leave the regulation of purely local transportation within commercial zones to the States, but the language and context of the statute itself can lead to no other conclusion.

The language of Section 303(b)(8) is unique and purposeful. It does not create the exemption of a class of commodities or traffic, or the complete exemption of transportation within the commercial zone. The exemption is restricted to transportation that is not under common control, management, or other arrangement for a continuous movement to or from a point outside the zone. Thus, Congress carefully defined the exempted transportation as that which is purely local drayage or cartage, and further, Congress conditioned the exemption of such local transportation by giving to the Interstate Commerce Commission the power to remove the exemption upon finding that Federal regulation is necessary to carry out the National Transportation Policy.

Such careful and specific language does not indicate an intent to leave the exempted transportation completely unregulated. On the contrary, it compels the conclusion that the intent was to leave the transportation to regulation by local authorities.

The intent of Congress to leave the regulation of certain motor carriers engaged in local operations to the States is further evidenced by 49 U.S.C. 304(a)(4a), which provides for the complete exemption of a carrier, or class of carriers, operating solely within a single State upon a finding by the Interstate Commerce Commission that such operations do not substantially affect or impair uniform regulation by the Interstate Commerce Commission in effectuating the National Transportation Policy.

The intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. *Kelly v. Washington,* 302 U.S. 1 (1937).

The Agricultural Exemption

Having found the legislative history inconclusive, the lower court, without attempting to analyze the meaning and intent of Section 303(b)(8) inherent in the words of the section itself, turned to another exemption for aid in interpretation.

The lower court's reliance upon what it calls an analogous exemption (49 U.S.C. 303(b)(6)) and *State Corporation Commission v. Bartlett,* 338 F. 2d 495, cert. den. 389 U.S. 964 (1964) is misplaced. Section 303(b)(6)

exempts the transportation of unprocessed agricultural commodities from regulation. The *Bartlett* case holds that Congress intended to "occupy the field" in the transportation of agricultural commodities and thus precluded the State from regulation. The case is not grounded upon a distinction between rate regulation and other types of regulation, as the lower court would have it, but rather on the clear intent of Congress that the transportation of unprocessed agricultural products should not be regulated at all. This Court has also recognized such Congressional intent. *East Texas Motor Freight Lines v. Frozen Food Express,* 351 U.S. 49 (1956).

The Railroad Transfer Case

The lower court has misapplied this Court's holding in *Railroad Transfer Service v. Chicago, supra.* There it was unmistakably clear that jurisdiction over motor transportation between railroad depots within the terminal areas was vested in the Interstate Commerce Commission. Jurisdiction within Section 303(b)(8) commercial zones was not at issue. Therefore this case affords no support for the lower court's finding of preemption.

The Freight Forwarder Act

The lower court attempted to support its finding of preemption with the Freight Forwarder Act and the exemption of nonprofit shipper associations (49 U.S.C., 1002(c)(1)) therein. This is faulty reasoning.

It is illogical to say that 49 U.S.C. 1002(c)(1), which excludes shipper associations from any regulation whatsoever, and 49 U.S.C. 1008, which authorizes common carriers to file assembly and distribution tariffs for freight forwarders and others similarly situated, offer further

support for the finding of preemption. The argument does not fit the preemption theory.

First, the exemption of transportation within commercial zones in Section 303(b)(8) had been in effect for seven years when Congress enacted the Freight Forwarders Act in 1952. Congress had no intention that this act should amend Section 303(b)(8).[4]

Second, freight forwarders are carriers, shipper associations are merely groups of shippers. By providing against the possibility of shipper associations being considered freight forwarders, as it did in Section 1002(c)(1), Congress did not change such associations or other shipper groups into carriers. The lower court's failure to recognize this distinction led it to a serious misconstruction of Section 1002(c)(1) and its effect. The court finds an indication in Section 1002(c)(1) that "nonprofit shipper associations enjoy a preferred status within the scheme of national transportation." Preferred over whom, or with respect to what privileges or rights? Congress did not create any preferred status by the section. It only said that shippers, singly, in groups, or in associations, consolidating or distributing freight for the purpose of taking advantage of volume rates are not to be construed to be freight forwarders so long as they do so on a nonprofit basis.

Third, the authorization of assembly and distribution tariffs, as provided in Section 1008, has no relevancy to preemption. The purpose of the section was to permit carriers performing assembling and distribution service to file appropriate rates therefor which would be available

4. "This is a bill proposing to give a legal status to freight forwarders in the country." Opening remarks of Mr. Lea of California in reporting the bill to the Committee of the Whole House. 87 Congressional Record Part 8, p. 8212.

to freight forwarders and other shippers tendering shipments under similar circumstances.[5] The lower court draws from this authorization some inference that Congress intended to make those assembly and distribution tariffs applicable to transportation wholly within commercial zones. But that inference is not justified by the language of the section, or any legislative history. The exemption of motor carrier transportation within a commercial zone depends on whether it is purely local or whether it is performed under common control, management, or other arrangement for a continuous movement into or out of the zone. Section 1008 does not purport to make assembly and distribution tariffs applicable to transportation within commercial zones that is exempt under Section 303(b)(8). If transportation is exempt from regulation by the Interstate Commerce Commission, no tariff filed with it has application to that transportation. Section 1008 did not amend Section 303(b)(8).

Lastly, the lower court erroneously assumed, in trying to support its preemption finding, that the benefits of carload or volume rates, referred to in Section 1002(c)(1), extend beyond the break-bulk point. The consolidated shipments are entitled to the benefit of the carload or volume rates on the line-haul portion (terminal-to-terminal movement) of the shipment. The assembly and distribution rates are spe-

5. "Having concluded that joint rates between forwarders and carriers should be prohibited, but being desirous of preserving to the public existing forwarder service to the smaller points, insofar as this could be done in consonance with the national transportation policy enunciated in the Transportation Act of 1940, your committee gave consideration to the question of permitting carriers performing assembling or distribution service to make special rates therefor less than their regular rates which could be used by forwarders and other shippers under similar circumstances." 87 Congressional Record Part 8, pp. 8218-19.

cifically limited to less-than-carload or less-than-truckload shipments.[6]

Therefore the lower court's reliance upon the Freight Forwarder Act to find preemption is without support in fact or logical reasoning.

It is respectfully submitted that the lower court erred in finding that the interstate transportation wholly within exempt commercial zones has been preempted by the federal government.

The District Court Erred In Finding a Violation of the Commerce Clause

The lower court says, in effect, that even if there is not preemption, it is beyond the police power of the State to prescribe rates for the regulation of interstate transportation which is purely local in nature and which is specifically excluded from the economic regulatory provisions of the Interstate Commerce Act. If there is no preemption, then the problem resolves itself to the question of what power do the States have to regulate interstate commerce.

This Court has made it clear that the commerce clause does not prohibit all regulation of interstate commerce by the States. The subjects properly regulated by the States include: the size and weight limitation on motor vehicles;[7] prevention of fraud and deception;[8] direct consumer sales

6. "For the reasons indicated the language of section 408 has been drawn so as to limit its provisions to less-than-carload or less-than-truckload rates. The section contains no authority for the making of assembling or distribution rates or charges applicable on shipments tendered in carload or truckload lots." 87 Congressional Record Part 8, p. 8219.

7. *Maurer v. Hamilton*, 309 U.S. 598 (1940); *So. Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

8. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

of gas;[9] maintenance of sanitary conditions and adequate prices;[10] control of transportation of liquor;[11] the prevention of fraud and over-reaching by transportation agents;[12] the protection of the public from fraud and sharp practices on the part of insurance agents;[13] the fixing of maximum charges which warehousemen may charge tobacco growers;[14] and the control of air pollution.[15]

In addition to the above, this Court has recognized for well over a hundred years that the States may regulate and fix the rates of purely local interstate transportation under the local concern doctrine. The lower court's finding that economic regulation of such transportation is beyond the police power of the State completely ignores a long line of cases beginning with *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851), and further developed in *Port Richmond and Bergen Point Ferry Co. v. Board of Freeholders*, 234 U.S. 317 (1914) and *Wilmington Transportation Company v. Railroad Commission*, 236 U.S. 151 (1915).

The lower court cites *Ohio Railroad Com. v. Worthington*, 225 U.S. 101 (1912) for the proposition that a State may not impose direct economic burdens on commerce through the establishment of rates in the absence of compelling reasons. The *Worthington* case is distinguishable. There,

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9. *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507 (1947).

10. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939).

11. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

12. *California v. Thompson*, 313 U.S. 109 (1941).

13. *Robertson v. California*, 328 U.S. 440 (1946).

14. *Townsend v. Yeomans*, 301 U.S. 441 (1937).

15. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

the main question was whether the transportation involved was interstate in nature. The Court found that it was interstate by analogy to *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911) where the Court found similar interstate transportation to be subject to the jurisdiction of the Interstate Commerce Commission. Therefore, the Court held in *Worthington* that the State could not regulate such transportation.

In the instant case, the Commission has conceded that the transportation involved is interstate in nature. The question is whether such purely local interstate transportation was intended by Congress to be left to the States for regulation. It should also be noted that in *Worthington* the State attempted to apply a different rate from the one which applied to similar intrastate transportation. Appellant Commission applied the same rate for both interstate and intrastate transportation within local drayage areas.

The lower court cites a general proposition of law from the *Shreveport Rate Case, Houston and Texas Railway Co. v. United States,* 234 U.S. 342 (1914), "that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by the federal authority."

The lower court concedes that no federal rate has been set for the transportation in question. Furthermore, the court overlooks the fact that the transportation here is purely local in nature, and is not under a common control, management, or other arrangement for a continuous movement. Therefore, to rely upon a generalization from a case that does not fit the circumstances here results in an erroneous conclusion.

The Court further supports its conclusion that California's minimum rates impose an unreasonable burden on interstate

commerce by relying on the case of *Buck v. Kuykendall*, 267 U.S. 307 (1925) for the proposition that the commerce clause protects interstate commerce from actions by any state which result in an unreasonable disruption of the free flow of commerce. In the *Buck* case, the State of Washington attempted to apply its certification statutes to a carrier engaged solely in interstate commerce. In prohibiting such application, the Court was not at all concerned with purely local transportation, nor was the Court concerned with the exemption of such transportation from a comprehensive federal regulatory program. Thus again, the use of generalizations to apply to a specific and narrow situation leads the court to an erroneous conclusion.

If the lower court's conclusion that California's minimum rates impose an unreasonable burden on interstate commerce is based on the finding that they would increase transportation costs to nonprofit shipper associations, then the judgment cannot be sustained. For, if the State has the power to regulate, it can only be restricted if it exercises such power in an unreasonable manner. (*So. Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).) The lower court made no finding that California's minimum rates were unreasonable, and specifically declined (Footnote 6) in its opinion to make any finding "that the California rate structure was designed to be applied to motor carriers performing services for nonprofit shipper associations."

Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922), which the lower court cites for the proposition that ". . . any indirect safety benefit which may accrue to the State through the imposition of higher tariffs and consequently higher profits will not suffice to support the measure as a safety measure." is not in point. The *Lemke* case involved the

regulation of the sale of a commodity—grain—and had nothing to do with safety.

The lower court, by relying upon general propositions of law from cases that have no direct relationship to the case at bar, has overlooked the fact that here we are dealing with a very limited and restricted area in interstate transportation, an area that has been specifically exempted from federal regulation by Congress.

The lower court's position ignores the thoroughly established principle that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two connot be reconciled or consistently stand together. *Kelly v. Washington,* 302 U.S. 1, 10 (1937).

There is no overlap of California's rate regulation with any federal regulation in the commercial zone area. Thus, the lower court ignores the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 448 (1960).

It is respectfully submitted that the lower court erred in finding that California's regulation is in violation of the commerce clause of the Constitution of the United States.

CONCLUSION

Probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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(Appendices Follow)

Appendix A

District Court Opinion

United States District Court
for the Northern District of California

Filed May 23 1967
Clerk, U. S. Dist. Court, San Francisco

Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., United Shippers Association, Inc., *Plaintiffs,* vs. Public Utilities Commission of the State of California and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45076 Civil
Charles J. Worth Drayage Company, Los Angeles Wholesale Institute, *Plaintiffs,* vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45123 Civil
G. I. Trucking Company, Redway Truck and Warehouse Company, *Plaintiffs,* vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, *Defendants.*	No. 45576 Civil

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ORDER GRANTING PERMANENT INJUNCTION

Before: Hamlin, Circuit Judge, and Burke and Zirpoli, District Judges.

Zirpoli, J.

This is an action brought by two classes of plaintiffs, (1) nonprofit cooperative shippers' associations, and (2) motor carriers who contract with such shippers' associations to deliver their goods from break-bulk points to final destinations, both within the State of California. The action is brought to contest the jurisdiction of defendants to require the carriers to assess charges in accordance with minimum rate tariffs published by the Public Utilities Commission of the State of California for delivery services performed wholly within commercial zones.[1]

The action was instituted in the district court pursuant to the provisions of 28 U.S.C. §1331(a) because it raises federal questions wherein the alleged matter in controversy exceeds the sum or value of $10,000, and the invoking of a three-judge district court was requested under the provisions of 28 U.S.C. §§ 2281 and 2284 because the requested relief includes enjoining a state official from enforcing a state regulatory scheme. Plaintiffs seek a declaratory judgment that defendants lack jurisdiction to regulate rates in this matter, 28 U.S.C. § 2201, and a permanent injunction preventing defendants from enforcing said rates against plaintiff motor carriers.[2]

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1. Defendants claim jurisdiction to regulate the rates in question by virtue of Cal. Pub. Util. Code §§ 3506, 3906, which allow regulation "insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States". Provision for establishment of rates is provided for in Cal. Pub. Util. Code §§ 3661-3670 and 4011-4016, pursuant to which schedules of minimum rates have been established.

2. In view of the fact that defendants have definitely acted to assert jurisdiction over plaintiff motor carriers in such manner

The factual setting of the case is as follows: Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association Inc., Industrial Shippers Association, Inc. and United Shippers Association, Inc.; the plaintiffs in No. 45076 and Los Angeles Wholesale Institute, a plaintiff in No. 45123 are nonprofit shippers cooperative associations incorporated in various states. They exist primarily for the purpose of providing shipping services to members at no profit to the association and at a saving over other means available to the shippers. Freight costs to members are reduced, first, by pooling loads for the most efficient shipping over long haul interstate routes and, second, by centralizing assembly and distribution techniques in the pick-up and delivery of the goods. The result is full shipments over the long haul and direct shipments to assembly points and from break-bulk points. The function of these associations is well established and recognized.[3]

Charles Worth Drayage Co., G. I. Trucking Company, and Redway Truck and Warehouse Company are plaintiffs

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as will affect plaintiff nonprofit shippers' associations and have threatened the imposition of sanctions against the motor carriers, the case is clearly "ripe for determination" within the requirements of the Declaratory Judgment Act. See *Public Service Comm. v. Wycoff Co.*, 344 U.S. 237 (1952); *Railroad Transfer Service Inc. v. Chicago*, ... U.S. ....., 35 U.S.L. Week 4306 (decided March 27, 1967).

3. The existence and function of nonprofit shippers associations has long been recognized. The provisions of the Freight Forwarder Act exempting nonprofit shippers associations from regulations, 49 U.S.C. § 1002(c)(1), went into effect in 1942. 56 Stat. 284. The stipulated facts show that the plaintiff shippers associations in this case have been shipping into California beginning as early as 1938 (Los Angeles Wholesale Institute) and beginning as late as 1960 (Charter Oak Shippers Cooperative Association, Inc.), with most of them beginning operation in California between 1954 and 1959. (Joint Pre-trial Order pp. 15-16.)

in Nos. 45123 and 45576. They are motor carriers holding certificates of public convenience from defendant Public Utilities Commission of the State of California and are authorized to operate in specified areas within the State of California. Charles Worth Drayage Company operates in an area which roughly corresponds to the San Francisco commercial zone. G. I. Trucking Company is authorized to carry specified cargoes within an area which includes Los Angeles, San Diego and such points as Lompoc, thus embracing an area larger than the Los Angeles commercial zone. Redway Truck and Warehouse Company operates within the Los Angeles basin and additionally provides storage facilities within that area, which is somewhat larger than the Los Angeles commercial zone.

The parties have stipulated that the entire movement involved here is in interstate commerce, thus the only issue before the court is the propriety of the defendants' attempts to impose a schedule of minimum rates to be charged by the motor carriers to the nonprofit shippers' associations for deliveries made within the commercial zones.

The statutory scheme of regulation under the Interstate Commerce Act involves Part II of the Act, known as the Motor Carrier Act, 49 U.S.C. §§ 301-327 and Part IV of the Act, known as the Freight Forwarders' Act, 49 U.S.C. §§ 1001-1022.

The first relevant section is 49 U.S.C. § 303(b)(8), which is part of the section listing exemptions from the comprehensive scheme of regulation of the Motor Carrier Act. The effect of the section is to exempt motor carrier transportation within commercial zones from regulation, with the exception of those provisions which relate to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, until such time as the

Commission finds that the national transportation policy makes it necessary to regulate these areas. This section provides:

49 U.S.C § 303(b)

> . . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, . . .

The second relevant section is 49 U.S.C. § 1002(c)(1), which is part of the section listing exemptions from the regulatory scheme of the Freight Forwarders' Act. The section exempts nonprofits shippers' associations from the regulation and registration requirements which apply to freight forwarders. This section provides:

49 U.S.C. § 1002(c)

> (c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, ...

Freight forwarders and nonprofit shippers' associations perform nearly identical functions, except for the fact that the freight forwarders hold themselves out to do business with the public, rather than providing services only for

members of an association, and they operate at a profit rather than as a nonprofit service to members. Each handles the consolidation, shipment and distribution of goods, attempting to take advantage of bulk rates and the maximum efficiencies in assembly, distribution and routing techniques.

The last major relevant section is 49 U.S.C. § 1008, which is part of the Freight Forwarder Act allowing common carriers to file tariffs when serving freight forwarders and others similarly situated in assembling and distributing their goods. The section provides:

49 U.S.C § 1008

> Nothing in this Act shall be construed to make it unlawful for common carriers subject to chapters 1, 8, or 12 of this title to establish and maintain assembling rates or charges and/or distribution rates or charges, and classifications, rules, and regulations with respect thereto, applicable to freight forwarders and others who employ or utilize the instrumentalities or services of such common carriers under like conditions, which differ from other rates or charges, classifications, rules, or regulations which contemporaneously apply with respect to the employment or utilization of the same instrumentalities or services, if such difference is justified by a difference in the respective conditions under which such instrumentalities or services are employed or utilized. For the purposes of this section (1) the term "assembling rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments into a point for further movement beyond as part of a carload or truckload shipment, and (2) the term "distribution rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments moving from a point into which such shipments have moved as a part of a carload or truckload shipment. The provisions of this section shall not be construed to authorize the establishment of assembling

rates or charges or distribution rates or charges covering the line haul transportation between the principal concentration point and the principal break-bulk point.

Historically, it appears that motor carriers at one time performed delivery services from break-bulk points to final destinations entirely within commercial zones without regulation by the California Public Utilities Commission. The Public Utilities Commission then ordered the motor carriers to comply with its minimum prescribed rates, which one or more, if not all, of them did for a period of time. Subsequently, the motor carriers, acting pursuant to 49 U.S.C. § 1008, filed tariffs with the I.C.C. establishing rates generally lower than those minimums prescribed by the Public Utilities Commission, and from that time they have continued to charge in accordance with the tariffs filed with the I.C.C. and have refused to comply with the orders of the Public Utilities Commission, despite the threat of impositions of sanctions, including fines and suspension of operating permits.

THE LEGAL ISSUES.

Plaintiffs contend that defendants are precluded from regulating the rates charged by plaintiff motor carriers to plaintiff nonprofit shippers' associations because (1) Congress has pre-empted the field by virtue of the comprehensive regulatory scheme of the Interstate Commerce Act, (2) the minimum rates established by defendants for deliveries within commercial zones are higher than the assembly and distribution tariffs negotiated between the nonprofit shippers' associations and the motor carriers and constitute an unlawful burden on interstate commerce in violation of Article I, Sect. 8 of the United States Constitution, (3) the defendants' tariffs would amount to a taking

of property without due process of law and would violate the equal protection clause of the United States Constitution, and (4) tariffs filed with the Interstate Commerce Commission are valid and in effect within the commercial zones in question, thus precluding regulation by defendants.

Defendants concede that the issues are as stated by plaintiffs, but contend that rather than pre-empting the field, Congress has specifically left regulation in the commercial zones to the states, and even if this is not so, state regulation is necessary to fill the gap formed by the commercial zone exemption. They further contend that there is a valid state interest in a uniform regulatory system, that the prescribed state system does not unreasonably burden interstate commerce, nor violate the due process or equal protection clauses of the United States Constitution, and that the tariffs filed with the I.C.C. are not applicable within commercial zones.

In view of the disposition made by the Court in this matter, it will only be necessary to consider the pre-emption issue and the burden on interstate commerce issue; accordingly, arguments made with respect to the other issues will be relevant only insofar as they relate also to the two issues to be discussed.

THE PRE-EMPTION QUESTION

The merits of pre-emption under the Supremacy Clause, U.S. Const. Art. VI, Par. 2, turn upon an analysis of what is being regulated, by whom, for what purpose, and the statutory language and congressional intent. In this instance, the question involves the regulation of rates by the Public Utilities Commission of the State of California in the interest of maintaining a uniform regulatory system with no "unregulated gaps". The nature of the regulation in-

volved here raises serious questions, for it is economic regulation of interstate commerce in an area which is not, practically speaking, capable of concurrent administration by both the state and federal governments. The famed *Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U.S. 342 (1913), indicates that this is an area in which there is a significant federal interest and in which the states must tread lightly.

Turning to the question of statutory construction and congressional intent, it becomes apparent that the Interstate Commerce Act has pre-empted the field. Both plaintiffs and defendants argue that the congressional intent as manifested in the legislative history of the statutes favor their respective viewpoints. The court finds that the legislative history is inconclusive.[4] The first and principal statute involved here is 49 U.S.C. § 303(b)(8). This section unambiguously exempts transportation wholly within commer-

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4. With respect to 49 U.S.C. § 303(b)(8), Senator Wheeler, who introduced the bill, appears to have envisioned state regulations when he explained its provisions as follows:

> Furthermore, an exemption is made, unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones, as between New York and New Jersey, and also, for instance, as between Washington and Alexandria, and other contiguous cities where the transportation is regulated by the local governments themselves. 79 Cong. Rec. Part 5, p. 5650.

On the other hand, the House debates indicate that a state could not regulate any interstate commerce. It was stated during the debates:

> In the case of *Buck v. Kuykendall*, (267 U.S. 307) the court held that a State could not regulate motor carriers operating in interstate commerce, and that the matter of control of carriers in interstate commerce was entirely in the hands of Congress to provide for Federal regulation.
>
> This decision left the door wide open. . . . 79 Cong. Rec. Part II, p. 12206.

cial zones from regulation, but does not specifically spell out whether or not state regulation is envisioned or permitted. Some aid in interpreting this section can be found by analogy to a similar exemption provision of the Motor Carrier Act.

Pre-emption has been found under 49 U.S.C. § 303(b)(6), which exempts motor vehicles used to carry nonmanufactured agricultural commodities. *State Corporation Comm. v. Bartlett*, 338 F. 2d 495 (10th Cir. 1964). *Bartlett* involved the transportation of grain within the State of Kansas to a processing point from which it was ultimately shipped in interstate commerce. After finding that the initial shipment was in the flow of commerce and thus considered to be in interstate commerce, the court held that there was pre-emption. Defendants suggest that the case is distinguishable because it dealt with an agricultural exemption with a peculiar legislative history which distinguishes it from the commercial zone exemption. This court disagrees. Although there is mention of the legislative history of the agricultural exemption, the holding appears to be grounded primarily upon the distinction between rate regulation and other types of regulation practiced by the states. The opinion indicates that the states' interest in highway safety, police power, health and safety and prevention of fraud are much greater than in the area of rate regulation, which it viewed as having "commercial aims". *State Corporations Comm. v. Bartlett, supra* at 498-499. Certainly, the instant case has overtones of commercial regulation, however sincere and highly motivated the defendants may be. It is clear that forcing plaintiff motor carriers to charge higher rates to plaintiff non-profit shippers results in some competitive advantage to local manufacturers and producers of goods by increasing

the costs to distant sellers in the marketing of their goods in California commercial zones.

Defendants maintain that California has a legitimate interest in maintaining minimum rates and regulation to see that sufficient marginal profit is made to allow the motor carriers to maintain their equipment in a safe manner and to protect the economic welfare of California motor carriers by not allowing them to engage in cutthroat competition with each other for the business of the nonprofit shippers' associations.

The United States Supreme Court recently considered similar arguments with respect to terminal zone transfer service which is regulated by the Interstate Commerce Act, but exempted from regulation under the Motor Carrier Act by 49 U.S.C. § 302(c)(2). The Court held that the City of Chicago was not free to impose a comprehensive licensing scheme under the guise of general safety regulations. *Railroad Transfer Service Inc. v. Chicago,* ..... U.S. ....., 35 U.S.L. Week 4306 (decided March 27, 1967). In the instant case no one has disputed the jurisdiction of defendants to directly impose reasonable safety regulations, but they are not free to accomplish this alleged goal indirectly through such a method as rate regulation.

Defendants' contention that the regulation can be justified as a protection against destructive competition is without merit. Defendants introduced no evidence to establish that harm of this nature had occurred, but assuming arguendo that such a showing had been made, the interest the State asserts is one of economic protection for common carriers and does not come within the health, safety and welfare, or police power interests which have been recognized to have validity.

Further support for the finding that there is pre-emption is found in the Freight Forwarder Act. As previously

discussed, the functions performed by freight forwarders and nonprofit shippers' associations are nearly identical, with the exception of the profit motive and service to the general public in the case of the freight forwarder as compared with the nonprofit shippers' association. Were it not for this distinction recognized in 49 U.S.C. § 1002(c)(1), nonprofit shippers' associations would be treated as freight forwarders. Motor carriers performing delivery services for freight forwarders within commercial zones in the State of California are not regulated by defendants because they are precluded from such regulation by virtue of the provisions of 49 U.S.C. § 302(c)(1), which indicates that motor carriers are exempted from regulation under the act when performing services for freight forwarders within "terminal areas" [which terminal areas are defined by the same limits as the commercial zones of 49 U.S.C. § 303(b)(8), see *Sea-Land Service, Inc. v. United States,* 222 F. Supp. 558 (D.C. Del. 1963)]. Thus, the entire operation is subject to regulation under the Freight Forwarder Act. Regulation of these services, which are the same as those provided for nonprofit shippers' associations, by the states is thus prohibited by direct statutory pre-emption. Since nonprofit shippers' associations are exempted from treatment as freight forwarders, 49 U.S.C. § 1002(c)(1), the status of regulation within the commercial zones becomes a matter of significance if there is no general pre-emption of commercial zones by virtue of the Motor Carrier Act.

Assuming that the Motor Carrier Act alone has not pre-empted the field of commercial zone transportation, it appears that, nonetheless, the provisions of the Freight Forwarder Act relating to nonprofit shippers' associations and motor carriers providing services for them clearly

establish pre-emption.[5] The language of 49 U.S.C. § 1002 (c)(1) indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation. The exemption is made applicable to ". . . the operations of a shipper, or a group or association of shippers, in consolidating *or distributing* freight for themselves or for the members thereof, on a nonprofit basis, *for the purpose of securing the benefits of carload, truckload, or other volume rates. . . .*" (emphasis added). It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process. The activities of the motor carriers in delivery of the goods from break-bulk points to final destination is certainly an integral part of the distribution process, cf. *Lifschultz v. United States,* 144 F. Supp. 606 (S.D. N.Y. 1956), and it is clear that benefits are obtained by consolidated direct line distribution methods beyond break-bulk points.

Another section of the Freight Forwarder Act offers still further support for pre-emption. This is 49 U.S.C. § 1008, the section under which the plaintiff carriers have filed tariffs with the Interstate Commerce Commission. The application of this section is permissive, rather than mandatory, but it allows the establishment of assembly and distribution rates by common carriers serving ". . . freight forwarders and *others who employ or utilize the instrumentalities or services of such common carriers under like conditions. . . .*" Although the language does not refer specifically to nonprofit shippers' associations, they certainly come within the category of others who operate under

5. The court expresses no opinion on the question of whether the Motor Carrier Act alone pre-empts the field in view of the more persuasive reasoning for pre-emption found by reading Parts II and IV of the Act together.

like conditions. Consequently, if it is permissible for motor carriers to file tariffs with the I.C.C. when serving non-profit shippers' associations, it seems most likely that this permission would include tariffs for deliveries wholely within commercial zones in the same manner it does for freight forwarders, where the services performed by the motor carriers is practically identical.

Although pre-emption will not be lightly inferred unless the nature of the subject permits no other conclusion or Congress has unmistakenly so-ordained, *Florida Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963), the court finds that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carrier Act, Cf. *State Corporations Comm. v. Bartlett, supra,* and the Freight Forwarder Act and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation.

This finding is made not only in the three-judge capacity of the court, but also the original district judge finds individually that he would reach the same conclusion with respect to pre-emption. The individual finding is made to satisfy the jurisdictional requirement set forth in *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). The *Swift* case requires a substantial question of constitutional law to support three judge jurisdiction and holds that a finding solely on the grounds that the Supremacy Clause of the United States Constitution, Art. VI, has pre-empted the field is not such a question.

The court, sitting in its three-judge capacity, finds that the constitutional question presented under the Commerce Clause, U.S. Const. Art. I, Sect. 8, is not insubstantial and proceeds to consider the issue.

THE COMMERCE CLAUSE QUESTION

The court is of the opinion and finds that even in the absence of pre-emption, the scheme of rate regulation defendants seek to impose violates the Commerce Clause of the United States Constitution. U.S. Const. Art. I, Sect. 8.

In making this determination, the court is faced with essentially a balancing process to determine the relative importance of the competing interests. An analysis of the evidence shows that the imposition of California minimum rate tariffs will result in substantially higher costs to out-of-state shippers who ship through nonprofit shippers' associations and will result in a decrease in the flow of traffic into California. Defendants maintain that the rates are nonetheless justified, since the matter is one of primary local concern, and the State has a legitimate interest in maintaining a fully regulated system which would be disrupted by lack of direct regulation.

The testimony of Mr. A. E. Norrbom clearly establishes and defendants do not dispute that the distribution charges under the California minimum rate tariffs would be higher than those under the contract rates or assembly and distribution tariffs plaintiff motor carriers presently operate under. Defendants do no accept the precise figures and methods used by Mr. Norrbom in arriving at his comparisons, but they have made no specific studies themselves which show any substantial difference.[6] (See transcript, pp. 536-541). Plaintiffs have shown that defendants' tariffs would result in increases in delivery costs within the commercial zones of from approximately 24 per cent to 95

6. Considerable testimony was elicited at trial on the question of whether the California rate structure was designed to be applied to motor carriers performing services for nonprofit shippers' associations; in view of the disposition made, the court finds no need to reach that question.

per cent, with the average increase around 80 per cent. (Deposition of Norrbom, pp. 17-18; Plaintiffs' Exh. 6-9). The testimony of Mr. Saunders further establishes that these increases in local delivery costs would increase the total delivery costs of the nonprofit shippers' associations in the neighborhood of 12 per cent to 15 per cent. (Transcript, pp. 26-27). Accordingly, there can be no doubt that the rate regulation by the State of California would result in a substantial economic burden on commerce. The law is clear that a state may not, in the absence of compelling reasons, impose a direct economic burden on commerce through the establishment of rates. *Ohio Railroad Comm. v. Worthington,* 225 U.S. 101, 108 (1912); *Wilmington Transportation Co. v. Railroad Comm. of Calif.,* 236 U.S. 151 (1914). It has also long been established that "the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by the Federal authority." *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States,* 234 U.S. 342, 354 (1914). While there has been no federal rate set in this instance, there is a clear federal policy favoring nonprofit shippers' association, expressed in 49 U.S.C. § 1002(c)(1) even by comparison with freight forwarders, and freight forwarders are allowed to file assemby and distribution tariffs and negotiate rates in a manner like that in which plaintiffs desire to operate. 49 U.S.C. §§ 302(c)(2), 1008 and 1009. It is the view of the court that the effect is the same as that prohibited in the *Shreveport Rate Case* and is an unconstitutional burden on commerce.

This finding is further supported by evidence of violations of the "long and short haul principle". The testimony of Mr. Norrbom indicates and the defendants' expert, Mr.

Lane, agrees that instances would occur under the California tariffs where a motor carrier delivering goods from within a commercial zone would be forced to charge higher rates for the short haul deliveries within the commercial zone than for longer haul deliveries along the same route but outside of the commercial zone. (Deposition of Norrbom, pp. 27-30, Transcript, p. 630.) In the latter situation involving longer haul deliveries along the same route but outside the commercial zone, it is clear that the state is prohibited from regulation by the Motor Carrier Act.[7] This amounts to a direct and discriminatory burden on interstate commerce.

A further basis for finding an unconstitutional burden on commerce is found in the evidence introduced at trial that defendants' rate structure would result in an interference with the free flow of commerce.

Mr. Saunders testified that the increase in costs would result in a drying up of some of the traffic and an impairment of the ability of some out-of-state producers to compete in the California market. (Transcript, pp. 27-30, 33). He states in testimony that was nowhere effectively rebutted that "the California regulation would impose a trade barrier by artificially impairing the ability of producers in other states to compete with those in California." (Transcript, p. 30). The commerce clause clearly protects inter-

7. Section 303(b)(8) of Title 49 of the United States Code only exempts traffic within commercial zones, thus traffic travelling outside of commercial zones, though originating within commercial zones, is under the jurisdiction of the Interstate Commerce Commission. Carriers are permitted to file tariffs for this traffic under 49 U.S.C. § 1008. The evidence adduced at trial indicates that some motor carriers do not now file tariffs with the Interstate Commerce Commission, but rely upon the nonprofit shippers' association exemption, 49 U.S.C. § 1002(c)(1), to allow completely free contracting for rates. (See also 49 U.S.C. § 1009). The propriety of this practice is in no way before this court.

state commerce from actions by any state which result in an unreasonable disruption of the free flow of commerce. *Buck v. Kuykendall*, 267 U.S. 307 (1925). Defendants rely upon *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938), for the proposition that even a significant interference with the flow of commerce can be sustained. That case is distinguishable in that *Barnwell* dealt with a state interest in the safety and maintenance of its highways. A safety interest is high order of interest on the scale of state interests, but there is and can be no such interest directly allied to the fixing of minimum rates in this case. It is clear that any indirect safety benefit which may accrue to the state through the imposition of higher tariffs and consequently higher profits will not suffice to support the measure as a safety measure. Cf. *Lemke v. Farmers' Grain Co.*, 258 U.S. 50 (1922).

Defendants' contention that there is a significant state interest in uniformity of regulation within the State of California is first without factual support, and second, not the type of interest which is recognized under the commerce clause cases. Defendants' own witness, Mr. Kaspar, testified that the traffic of motor carriers delivering goods for nonprofit shippers' associations within commercial zones amounted to less than ¾ of 1 per cent of the overall freight traffic in California. (Transcript, p. 696). The cases cited by defendants to support state regulation despite some burden have all dealt with a different order of state interest. See *Milk Control Bd. of Pa. v. Eisenberg Farms*, 306 U.S. 346 (1939), (incidental burden, strong state interest in health); *Nebbia v. New York*, 291 U.S. 502 (1938), (price control attacked on due process and equal protection grounds). Defendants' reliance on *Wilmington Transportation Co. v. Railroad Comm'n of California*, 236 U.S. 151

(1915), requires some special comment. *Wilmington* involved state regulation of the rates charged by ferries serving passengers in transit between San Pedro on the California mainland and Avalon on Santa Catalina Island, both of which places were within Los Angeles County. The court upheld state regulation in this area despite the fact the voyage involved traversing the high seas. Since both ports were within the same state and county, there is an apparent analogy to transportation within a commercial zone; however, the analogy is not controlling. In *Wilmington*, the Court carefully pointed out that they were not dealing with property involved in the course of continuous transit between states. *Wilmington Transportation Co. v. Railroad Comm'n of California, supra* at 156. The case is thus distinguishable as one of purely local nature that only incidentally happens to pass in interstate commerce in a very technical sense. Similarly, *Port Richmond v. Bergen Point Ferry*, 234 U.S. 317 (1914), involved primarily local transportation and is distinguishable.

The court thus concludes that imposition of the minimum rates established by the Public Utilities Commission of the State of California amounts to an unreasonable and unconstitutional burden on interstate commerce.

In view of the findings on pre-emption and the burden on interstate commerce, it is unnecessary to reach the additional contentions raised by plaintiffs that defendants' rates would violate the equal protection and due process clauses. U.S. Const. Amend. XIV, Sect. 1., and likewise, to reach the question posed by plaintiff motor carriers regarding the filing of tariffs with the Interstate Commerce Commission.

Accordingly, plaintiffs' prayer for declaratory relief and a permanent injunction is granted. IT IS ORDERED that defendants be permanently enjoined from enforcing minimum rates published under the authority of the California Public Utilities Code upon plaintiffs.

This opinion and order constitute the court's findings of fact and conclusions of law in accordance with F.R. Civ. P. 52(a).

Dated: May 23, 1967

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ LLOYD H. BURKE
United States District Judge

/s/ ALFONZO J. ZIRPOLI
United States District Judge

District Court Judgment and Order

Original Filed September 7, 1967
Clerk, U. S. District Court, San Francisco

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Southern Division

Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., United Shippers Association, Inc., *Plaintiffs,* vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr. and Fred P. Morrissey, *Defendants.*	Civil Action No. 45076

Charles J. Worth Drayage Company, Los Angeles Wholesale Institute, *Plaintiffs*, vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr. and Fred P. Morrissey, *Defendants.*	Civil Action No. 45123
G. I. Trucking Company, Redway Truck and Warehouse Company, *Plaintiffs*, vs. Public Utilities Commission of the State of California, and Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr. and Fred P. Morrissey, *Defendants.*	Civil Action No. 45576

JUDGMENT AND ORDER

These actions were brought by two classes of plaintiffs, (1) nonprofit cooperative shippers' associations, and (2) motor carriers who contract with such shippers' associations to deliver their goods from break-bulk point to final destination, both points being within the State of California.

Plaintiff shippers' associations provide shipping services to members at no profit to the association and at a saving over other means available to the shippers by pooling members' shipments into carload or trailer load lots for shipment by railroad over long haul interstate routes.

Defendant seeks to require the carriers to assess charges in accordance with its minimum rate tariffs published under the authority of the California Public Utilities Code. The tariffs contain charges for delivery services performed wholly within commercial zones, which services are exempt from economic regulation by the Interstate Commerce Commission under the provisions of 49 U.S.C. 303(b)(8).

The parties have stipulated that the entire movement involved here is in interstate commerce, thus the only issue before the court is the lawfulness of the defendants' attempts to impose a schedule of minimum rates to be charged by the motor carriers to the nonprofit shippers' associations for deliveries made within the commercial zones.

Plaintiffs having filed in this Court a complaint for a declaratory judgment under The Declaratory Judgment Act, 28 U.S.C. 2201-02, and for a permanent injunction under 28 U.S.C. 2281, and in support thereof having produced testimony and authorities, this Court finds that plaintiffs, and each of them, are entitled to declaratory relief and a permanent injunction on the grounds that the comprehensive regulatory scheme of the Interstate Commerce Act, including both the Motor Carriers Act (Part II of the I.C.A.) and the Freight Forwarder Act (Part IV of the I.C.A.), and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation; that economic regulation of interstate transportation wholly within commercial zones in California, exempt from regulation as above described, for a group or association of shippers constitutes an unreasonable and unconstitutional burden on interstate commerce.

It Is Therefore Declared:

(a) That minimum rates, and rules and regulations pertinent thereto, prescribed and established by the Public

Utilities Commission of the State of California are inapplicable to the transportation in interstate commerce of property wholly within a municipality or between contiguous municipalities or within a zone adjacent to a [and] commercially a part of any such municipality or municipalities (49 U.S.C. 303(b)(8)) for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1), and

(b) That the Public Utilities Commission of the State of California and its Commissioners lack jurisdiction to regulate the rates and charges of motor carriers for interstate transportation of property within the State of California and wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers, and

It Is Therefore Ordered that defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with defendants, be permanently restrained and enjoined:

(a) From publishing tariffs and otherwise establishing minimum rates and rules and regulations therefor, under the authority of the law of the State of California with respect to motor transportation services in interstate commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1);

(b) From interfering with the businesses of a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1) in consoli-

dating or distributing freight in interstate commerce, and the businesses of motor carriers in interstate commerce performing transportation of property services wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1) by asserting the applicability of, and enforcing minimum rates, and rules and regulations therefor, under the authority of the law of the State of California; and

(c) From asserting, attempting to assert, applying, attempting to apply, enforcing, or attempting to enforce, any penalty provided by the law of the State of California for the assessing and collecting of rates and charges which are different than the minimum rates and charges prescribed by the California Public Utilities Commission for the transportation in interstate commerce of property wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities for a group or association of shippers exempted from the provisions of the Freight Forwarder Act by 49 U.S.C. 1002(c)(1).

Dated September 7, 1967

/s/ OLIVER D. HAMLIN
United States Circuit Judge

/s/ LLOYD H. BURKE
United States District Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix B

California Statutes

Calif. Public Utilities Code § 494 (Stats. 1951, c. 764, p. 2042.)

No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time, nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, except upon order of the commission as provided in this part, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons.

Calif. Public Utilities Code § 726 (Stats. 1951, c. 764, p. 2049.)

It is the policy of the State in rate making to be pursued by the commission to establish such rates as will promote the freedom of movement by carriers of agricultural commodities, including livestock, at the lowest lawful rates compatible with the maintenance of adequate transportation service.

In any rate proceeding where more than one type or class of carrier, as defined in this part or in the Highway Carriers' Act, is involved, the commission shall consider all such types or classes of carriers, and, pursuant to the provisions of this part or the Highway Carriers' Act, fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for

any such type or class of carrier. This provision does not prevent the commission from granting to carriers by water such differentials in rates as are permitted under other provisions of law.

Calif. Public Utilities Code § 730 (Stats. 1951, c. 764, p. 2049.)

The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules, and practices to be charged, collected, and observed by all such common carriers.

Calif. Public Utilities Code § 731 (Stats. 1951, c. 764, p. 2050.)

Whenever the commission, after a hearing, finds that any rate or toll for the transportation of property is lower than a reasonable or sufficient rate and that the rate is not justified by actual competitive transportation rates of competing carriers, or the cost of other means of transportation, the commission shall prescribe such rates as will provide an equality of transportation rates for the transportation of property between all such competing agencies of transportation. When in the judgment of the commission a differential is necessary to preserve equality of competitive

transportation conditions, a reasonable differential between rates of common carriers by rail and water for the transportation of property may be maintained by such carriers, and the commission may by order require the establishment of such rates.

Calif. Public Utilities Code § 3502 (Stats. 1951, c. 764, p. 2112, as amended Stats. 1963, c. 2147, p. 4477, § 14.)

The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public. It is the further purpose of this chapter to eliminate, so far as reasonably possible, the excessive use of highways that has resulted from excessive crosshauling of portland and similar cements which has heretofore pertained, when they are hauled in a motor vehicle or motor vehicles loaded substantially to capacity with such commodity or commodities, since these commodities move in great volume in vehicles that are loaded substantially to the permissible gross weight limits provided by the Vehicle Code.

Calif. Public Utilities Code § 3506 (Stats. 1951, c. 764, p. 2113.)

This chapter shall not be construed as a regulation of commerce with foreign nations or among the several states, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States.

Calif. Public Utilities Code § 3662 (Stats. 1951, c. 764, p. 2118.)

The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-discriminatory maximum or minimum or maximum and minimum rates to be charged by any highway permit carrier for the transportation of property and for accessorial service performed by it.

In establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service.

Calif. Public Utilities Code § 3666 (Stats. 1951, c. 764, p. 2118, as amended Stats. 1959, c. 1566, p. 3899, § 2.)

If any highway carrier other than a highway common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate.

Calif. Public Utilities Code § 3902 (Stats. 1951, c. 764, p. 2125.)

The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public.

Calif. Public Utilities Code § 3906 (Stats. 1951, c. 764, p. 2126.)

This chapter shall not be construed as a regulation of commerce with foreign nations or among the several states, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States.

Calif. Public Utilities Code § 4011 (Stats. 1951, c. 764, p. 2129.)

The commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and non-discriminatory maximum or minimum or maximum and minimum rates to be charged by any carrier subject to this chapter.

Calif. Public Utilities Code § 4015 (Stats. 1951, c. 764, p. 2129.)

If any carrier desires to perform any transportation or accessorial service at a lesser rate than the established minimum rates, the commission shall, upon finding that the proposed rate is reasonable and consistent with the public interest, authorize the lesser rate.

Appendix C

Federal Statutes

49 U.S.C. 302(c)(2)(1) (49 Stat. 498).

Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employers and safety of operation and equipment, shall not apply....

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transporation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

49 U.S.C. 303(b)(6)&(8) (49 Stat. 544).

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include ... (6) motor vehicles used in carrying property consisting

of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided,* That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however,* That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products); . . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transpor-

tation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, . . .

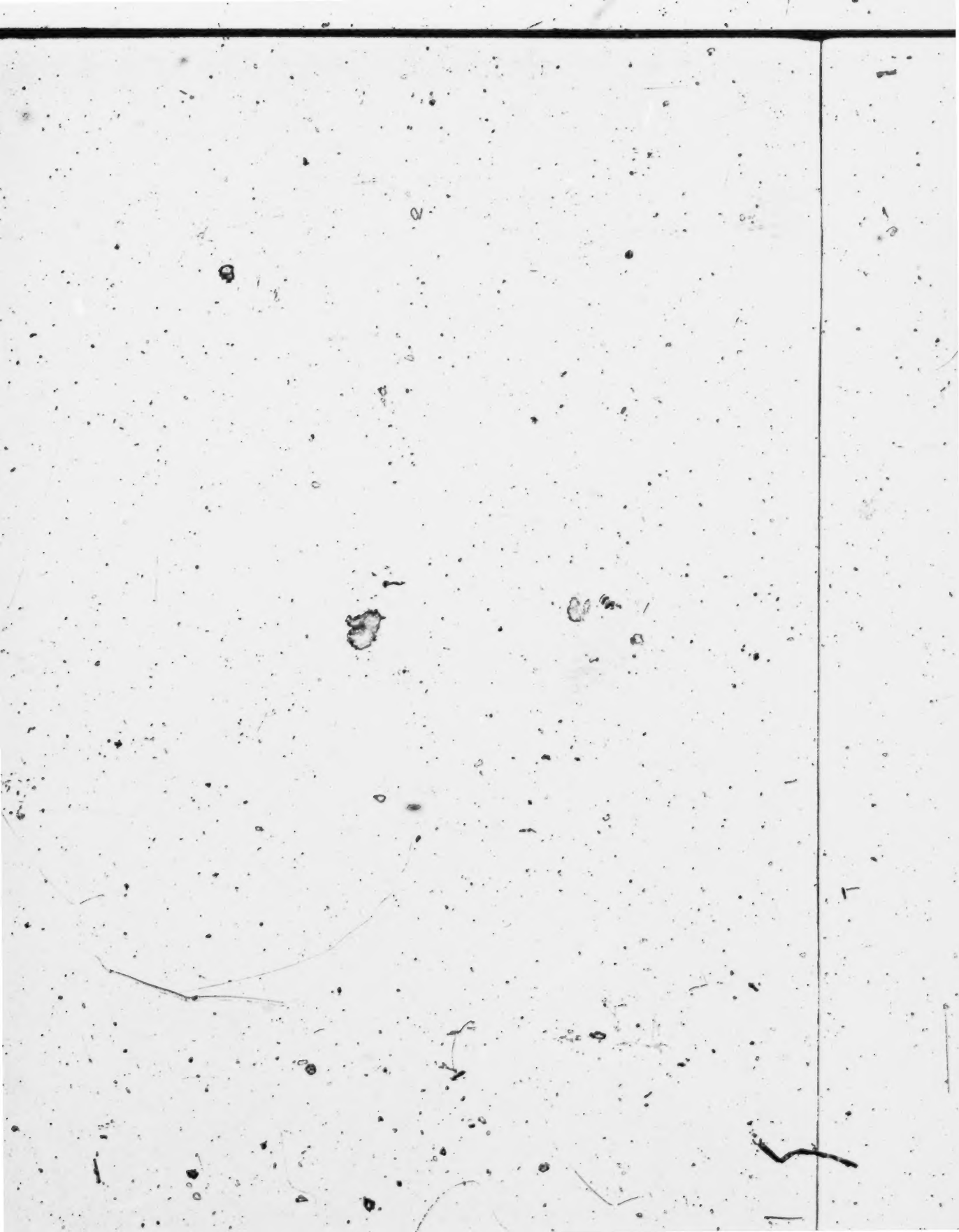
49 U.S.C. 1002(c)(1) (56 Stat. 284).

(c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits or carload, truckload, or other volume rates, . . .

49 U.S.C. 1008 (56 Stat. 290).

Nothing in this Act shall be construed to make it unlawful for common carriers subject to chapters 1, 8 or 12 of this title to establish and maintain assembling rates or charges and/or distribution rates or charges, and classifications, rules, and regulations with respect thereto, applicable to freight forwarders and others who employ or utilize the instrumentalities or services of such common carriers under like conditions, which differ from other rates or charges, classifications, rules, or regulations which contemporaneously apply with respect to the employment or utilization of the same instrumentalities or services, if such difference is justified by a difference in the respective conditions under which such instrumentalities or services are employed or utilized. For the purposes of this section (1) the term "assembling rates or charges" means rates or charges for

the transportation of less-than-carload or less-than-truckload shipments into a point for further movement beyond as part of a carload or truckload shipment, and (2) the term "distribution rates or charges" means rates or charges for the transportation of less-than-carload or less-than-truckload shipments moving from a point into which such shipments have moved as a part of a carload or truckload shipment. The provisions of this section shall not be construed to authorize the establishment of assembling rates or charges or distribution rates or charges covering the line haul transportation between the principal concentration point and the principal break-bulk point.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. AND FRED P. MORRISSEY, AS MEMBERS THEREOF,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal From the United States District Court
For the Northern District of California

MOTION TO AFFIRM

Appellees, CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY, respectfully move the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the court below was correct in granting the permanent injunction to prohibit the appellants from asserting economic regulation in a manner which resulted in a burden upon interstate commerce, and within a field preempted by federal regulation.

STATUTES INVOLVED

In addition to those statutes referenced by appellants, the following are also relevant: 54 Stat. 899.

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Found as preamble to Part I of Interstate Commerce Act.)

49 U.S.C., § 302 (a):

> "(a) The provisions of this chapter [Motor Carrier Act] apply to the transportation of passengers or property by motor vehicles engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation,

and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission."

SUMMARY OF ARGUMENT

1. *The Pre-emption Question.* The judgment of the court below was correct and is supported by the findings of fact and conclusions of law that the Interstate Commerce Act, including both the Motor Carrier Act (Part II) and the Freight Forwarder Act (Part IV), and the nature of the subject matter sought to be regulated by the appellants require a finding that the field involved has been pre-empted by federal legislation and is subject to regulation, if at all, by the Interstate Commerce Commission. The appellants attempted economic regulation of motor carriers performing services essential to interstate operations of bona fide nonprofit shippers associations is clearly regulation of a subject matter intended by Congress to be free from regulation "unless and to the extent" that the Interstate Commerce Commission determines that the national transportation policy requires such regulation. 49 U.S.C., § 303(b)(8). The fact that the Interstate Commerce Commission does not actively exercise its authority in all phases of the field does not permit appellants to step into the area of federal activity. *Railroad Transfer Service, Inc. v. City of Chicago,* 386 U.S. 351 (1967); *Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958); *Independent Truckers, Inc.* 212 F.Supp. 402 (Neb. 1963). Further, since nonprofit shippers associations, sanctioned by 49 U.S.C., § 1002(c)(1), operate in all essential respects as

freight forwarders,[1] motor carriers servicing nonprofit shippers associations may voluntarily establish assembling and distribution rates or charges as expressly provided by 49 U.S.C., § 1008, as have each of the appellee motor carriers. The express and direct conflict between appellants' attempted economic regulation and appellee motor carriers' valid assembling and distribution tariffs on file with the Interstate Commerce Commission, requires by all principles of pre-emption that the state regulation be struck down. U. S. Const., Art. VI, Par. 2, *Pennsylvania v. Nelson*, 350 U. S. 497 (1956). *Cf., United States v. Capital Transit Co.*, 325 U. S. 357 (1945).

2. *The commerce clause question.* The judgment of the court below was correct and is supported by its findings of fact and conclusions of law that the scheme of economic regulation appellants seek to impose upon the portion of interstate commerce transported by the appellee motor carriers is a direct and substantial burden upon interstate commerce and therefore is violative of the Commerce Clause of the United States Constitution. U. S. Const., Art. 1, Section 8; *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U. S. 342 (1914); *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101 (1912); *Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky*, 154 U. S. 204 (1894); *Wabash, St. Louis & Pacific R. Co. v.*

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[1] As was stipulated by the parties and found by the Court, the functions performed by freight forwarders and nonprofit shippers associations are nearly identical with the exception of the profit motive and service to the general public in the case of freight forwarders, as compared with the nonprofit shippers association. Each handles the consolidation, shipment, break-bulk, and distribution of goods, attempting to take advantage of the bulk rates and the maximum efficiencies in assembly, distribution and routing techniques.

Illinois, 118 U. S. 557 (1886); *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964), *cert. den.* 380 U. S. 964 (1965)

Aside from the basic principles supporting the lower court's judgment, the findings of fact are supported by uncontradicted evidence to the effect that if the appellants' scheme of economic regulation were to be allowed to continue, the increased transportation costs would result in a drying up of interstate traffic because of the inability of out-of-state producers to compete in the California market. Such an unreasonable disruption of the free flow of commerce is clearly prohibited. *Buck v. Kuykendall.* 267 U.S. 307 (1925). Further, the appellants' scheme of economic regulation results in an admitted unconstitutional violation of the "long and short haul" principle in that motor carriers serving nonprofit shippers associations would be forced to exact higher rates and charges for the short haul deliveries and pickups within a commercial zone than they would charge for the long haul deliveries and pickups outside of such zone. *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

3. There are no substantial questions presented by this appeal which require further argument before this Court; therefore, this Petition to Affirm should be granted. The court below applied time-honored principles of constitutional law in granting plaintiffs and appellees relief from an illegal, unreasonable, discriminatory and burdensome scheme of economic regulation of interstate commerce. None of the alleged "substantial questions" urged by the appellants in their jurisdictional statement

are meritorious.[2] The court below answered the essential constitutional questions before it regarding the Supremacy and Commerce clauses of the United States Constitution, and since these questions were dispositive of the matter, it was unnecessary for the court to consider any others.

ARGUMENT

I

THE PRE-EMPTION QUESTION

The court below was well founded in its decision that the supremacy clause of the United States Constitution forbids the type of economic regulation the appellants seek to impose upon the appellee motor carriers, which service interstate traffic for appellee nonprofit shippers associations. Whether the pre-emption occurs because the field involved is one left totally to federal regulation or because the attempted regulation is in conflict with federal regulation, the finding of pre-emption by the court below is well supported.

The lower court held that Congress has pre-empted the field authorized to be regulated by appellants. In doing so, it noted, and relied upon, in some degree, *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964). *Cert den.* 380 U. S. 964 (1965). Appellants would have this Court believe that *Bartlett*

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[2] While a few of the questions may require some discussion, most of them simply were not even before the court below or were disposed of by stipulation of the parties in the Joint Pretrial Order, and therefore, cannot be a subject of concern for this Court; *i.e.*, the status of nonprofit shippers associations *vis-a-vis*, a single shipper; or the propriety of appellants' regulation of purely local transportation which does not adversely burden interstate commerce.

only considered subsection (6) of 49 U.S.C., § 303(b). On the contrary, however, the Court in *Bartlett* specifically referred to the entire section 303 (b) and all of its exceptions in finding pre-emption, saying:

> "In the case at bar, the state interest is outweighed by the national interest. This case does not involve the exercise by the state of its powers over health and safety nor to protect its roads, as in Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969, and South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734. It is a proposed state regulation of rates and this has 'commercial aims.' Maurer v. Hamilton, supra. This might be considered to be a matter requiring exclusive federal regulation, under Ohio R. R. Comm'n v. Worthington, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004, or under The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, *but in any event we hold that Congress intended the federal regulation and the exceptions to occupy the entire field, and be protected as found by the trial court.*" (338 F.2d 495, at page 499. Emphasis added).

As was stipulated in the Joint Pretrial Order and found by the court below, the various appellee nonprofit shippers associations have, for a number of years, operated for their respective members to provide reduced freight costs by way of consolidating less than carload lots over long haul interstate routes and centralizing the assembly and distribution techniques in the pickup and delivery of the goods shipped in interstate commerce. The function and nature of such associations are well established and defined; nonprofit shippers associations must meet stringent requirements set down by the Interstate Commerce Commission or be subject to its regula-

tion as freight forwarders, 49 U.S.C., § 1002 (c)(1); *Atlanta Shippers Association, Inc.*, 322 I.C.C. 273 (1964); *cf., Pacific Coast Wholesalers Association v. United States*, 81 F.Supp. 991 (S.D. Calif. 1949).

Each of the motor carrier appellees herein service non-profit shippers associations either as the initial carrier which consolidates the less than carload shipments, or as the ultimate carrier which breaks-bulk and distributes the interstate shipments to the ultimate consignees. As was further found by the court below, and as set forth in the Joint Pretrial Order, some of the shipments into the State of California are delivered by the motor carriers, located within the "commercial zone" to consignees located within the same "commercial zone", and some of such shipments are delivered to consignees located outside of the commercial zone. The commercial zone is a territorial concept set forth in the provisions of 49 U.S.C., § 303(b)(8), and geographically delineated by the Interstate Commerce Commission, either by application of a general or specific population-mileage formula or specific metes and bounds description. See, *e.g.*, 49 C.F.R., § 170, *et seq; Los Angeles, California Commercial Zone*, 3 M.C.C. 248; *Los Angeles Harbor Commercial Zone*, 51 M.C.C. 676.

Congress expressly left the *extent* of regulation of motor carriers, transporting interstate traffic, within commercial zones to the Interstate Commerce Commission. 49 U.S.C., § 303(b)(8). By the express language of that section "unless and to the extent that the Commission" finds that the National Transportation Policy requires further regulation (other than hours and safety), such motor carriers shall not be regulated further. The Commission now exercises control over commercial zones by subjecting motor carriers operating in those zones to hours and safety regulations and defining the boundaries

of those zones (49 C.F.R. 190-197; 49 C.F.R. 170.1); therefore, the Commission has sufficiently acted to pre-empt the field and prevent further regulation by the states. *Charles Noeding Trucking Company v. United States*, 29 F.Supp. 537 (N.J. 1939). In adopting the comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce, Congress deprived the individual states of the power to exercise economic regulation over such interstate transportation. *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63 (1954); *United States v. Capital Transit Co.*, 325 U.S. 357 (1945); *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964). *Cert Den.* 380 U. S. 964 (1965). Such definitive and affirmative Congressional action per force prevents the various states from creating a multiplicity of necessarily variegated and checkerboard systems of economic regulation. *Railroad Transfer Service, Inc. v. City of Chicago*, 386 U.S. 351, 359 (1967); *Chicago v. Atchison, Topeka & Santa Fe R.R. Co.*, 357 U.S. 77 (1958).

Furthermore, in the instant case, the attempted state regulation of the field results in a direct conflict with federal legislation. Following the adoption of 49 U.S.C., § 303(b)(8), Congress adopted the Freight Forwarder Act (1942), which precisely defined and regulated interstate freight forwarders.[3] 49 U.S.C., § 1001, *et seq.* Therein, Congress specifically and precisely recognized the existence and practices of nonprofit shippers associa-

[3] Appellants argue that the court's decision results in overturning its purported authority for regulation of the field involved, *i.e.*, *In re Consolidated Freightways, Inc.*, 42 Cal.P.U.C. 721, *reh.den.* 313 U.S. 561, *reh.den.* 313 U.S. 599 (1941). It is significant that the case was decided *prior* to the enactment of 49 U.S.C., § 1001, *et seq.*, and further that *Consolidated* did not involve nonprofit shippers associations. It must be assumed that the section was adopted with that case as well as 49 U.S.C., § 303(b)(8) in mind.

tions and forbade regulation of such associations as freight forwarders. (49 U.S.C., § 1002(c)).

To further assure nonprofit shippers associations the benefits of operating as non-regulated freight forwarders, Congress referred to them in 49 U.S.C., § 1008, where it allowed motor carriers to file assembling and distribution tariffs for services performed in other than the line haul portion of the carriage.[4]

As the court below found and as appears in the Joint Pretrial Order, the appellee motor carriers have for some time filed such tariffs with the Interstate Commerce Commission. Since deviation from such tariffs may result in sanctions imposed upon respondent carriers by the Commission (49 U.S.C., §§ 4,316(b), 317(b)),[5] there is obviously a conflict between the attempted state regulation and the federal legislation, in violation of Article VI, paragraph 2 of the United States Constitution. *Cf., Biff v. Navajo Freight Lines,* 359 U.S. 520 (1959); *Pennsylvania vs. Nelson,* 350 U.S. 497 (1956).

II

THE COMMERCE CLAUSE QUESTION

As a separate and sufficient ground for granting appellees the relief sought, the court below properly found that the economic regulation sought to be imposed by

[4] The Act allows motor carriers who service freight forwarders" . . . and others who employ or utilize the instrumentalities or services of such common carriers under like conditions . . ." to file tariffs with the Interstate Commerce Commission which establish assembling and distribution tariffs which differ from other established rates or charges. There is no question that the reference to "others" includes nonprofit shippers associations as the court below found.

[5] See discussion of "long and short haul" principle, Page ...., *infra.*

appellants violated the Commerce Clause, Article I, Section 8 of the United States Constitution.

As is discussed briefly, *supra,* appellee nonprofit shippers associations are able to provide their members interstate transportation at rates that allow them to ship their goods to California and other states and economically compete with local producers, because of the savings which result from the use of the federally sanctioned nonprofit shippers associations. The court below found, in light of the uncontradicted evidence, that the increased freight rates sought to be imposed by appellants upon the nonprofit shippers associations would ". . . impose a trade barrier by artificially impairing the ability of producers in other states to compete with those in California."[6] Such a result is clearly prohibited. *Buck v. Kuykendall,* 267 U. S. 307 (1925); *Wilmington Transportation v. Railroad Commission of Calif.,* 236 U.S. 151 (1914).[7] Appellants argue that for years states have been allowed to impinge upon the free flow of commerce when a proper state power is exercised to protect an appropriate state interest, and the burden upon the free flow

[6] The minimum rates sought to be imposed upon appellee nonprofit shippers associations would not be imposed upon freight forwarders since such regulation is precluded by the provisions of 49 U.S.C., § 302(c)(1), when the transportation is within a freight forwarder's terminal area "[which terminal areas are defined by the same limits as the commercial zones of 49 U.S.C., § 303(b)(8), see *Sea-Land Services, Inc. v. United States,* 222 F.Supp. 558 (Del. 1963)]". Therefore, the attempted economic regulation results in diminishing, to a substantial degree, the favorable effect of 49 U.S.C., § 1002(c) wherein Congress expressed an intent to allow nonprofit shippers associations to enjoy the advantages of an unregulated market place.

[7] Moreover, enlightened carriers' rate structures are not designed merely to favor the revenues of producers and carriers but to safeguard the consumer interest as well by equalizing access to markets. *Ayshire Collieries Corp. v. United States,* 335 U.S. 573 (1947).

of commerce is not substantial. To this basic principle appellees offer no argument, as indeed, they could not. However, the court below properly found that in this case economic regulation was not an appropriate state interest, and does not come within the recognized health, safety and welfare, or police power interests. *Cf., South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922); *State Corporation Commission v. Bartlett*, 338 F.2d 495 (10th Cir. 1964); *cert.den.* 380 U. S. 964 (1965). The only state interest seriously argued by appellants was that of an interest in uniformity of regulation within the state. The court correctly found that a need for such uniformity was not supported by the evidence, and further, it was not the type of interest recognized under the commerce clause cases. Notwithstanding the lower court's precise holding, appellants in their "jurisdictional statement" continue to urge inapposite authorities and have offered no authority to support their novel approach to basic principles of constitutional law.

Therefore, appellants' position regarding the state's ability to substantially burden interstate commerce deserves no further consideration by this Court.

As a further and sufficient basis for the court's finding that the commerce clause prohibits the attempted economic regulation, it is undisputed that the appellants' scheme of regulation violates the "long and short haul" principle. The *Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U. S. 342 (1914). The fact that appellee carriers will be required to charge the associations higher rates for a shorter haul under appellants' scheme is sufficient to affirm the Court's decision below. *Significantly, appellants do not argue to the contrary, nor do they criticize the lower court's decision in this regard.* Therefore, on this ground alone, the motion should be granted.

III

NO QUESTIONS ARE PRESENTED WHICH REQUIRE FURTHER ARGUMENT BEFORE THIS COURT.

The lower court construed all relevant sections with clarity and certainty, following time-honored principles of constitutional law, and conformed to and are not in conflict with any other decision rendered by any other federal court. *Railroad Transfer Service, Inc. v. City of Chicago,* 386 U. S. 351, 359 (1967); *Chicago v. Atchison, Topeka & Santa Fe RR. Co.,* 357 U.S. 77 (1958); *State Corporation Commission v. Bartlett & Co., Grain,* 338 F.2d 495 (10th Cir. 1964). *Cert den.* 380 U.S. 964 (1965). Any of the straw men arguments of appellants regarding the ability of states to regulate purely local cartage are inapposite since the instant case involves an integral part of interstate commerce, rather than local cartage.

The cases cited by appellants regarding the ability of states to regulate commerce all deal with the exercise of an appropriate power to protect appropriate state interests; namely, health, safety and welfare, all of which have been recognized to have validity. (Appellants' Juris. Stmt., pp. 24, 25).[8]

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[8] *Maurer v. Hamilton,* 309 U.S. 598 (1940); *So. Carolina State H. Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938) (size and weight limitation on motor vehicles); *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132 (1963) (prevention of fraud and deception); *Panhandle Eastern Pipeline Co. v. Public Service Commission,* 332 U.S. 507 (1947) (direct consumer sales of gas); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939) (maintenance of sanitary conditions and adequate prices); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132 (1939) (control of transportation of liquor); *California v. Thompson,* 313 U.S. 109 (1941) (prevention of fraud and over-reaching by trans-

However, appellants have offered no authority to support their assertion of jurisdiction over the instant integral part of interstate commerce. Appellants have not offered one valid basis for such regulation, nor have they offered one state interest which needs to be served or will be served by the proposed regulation of rates of the motor carriers engaged in interstate commerce. Under these circumstances, this motion should not be granted.

IV

CONCLUSION

Since the decision of the court below was eminently correct in finding pre-emption of the field involved, either because the federal legislation encompasses the whole field and therefore the State is precluded from regulating the area, or the Interstate Commerce Commission has sufficiently acted in the field to prevent the State from acting, or the attempted regulation by the State of California results in an actual conflict with the federal regulation. Any of these bases is sufficient to support the court's decision.

Additionally, as separate grounds, the decision is correct because of the violation of the commerce clause in that the attempted regulation imposes a trade barrier upon interstate commerce, the state has no valid interest to justify even an incidental burden on interstate commerce, and finally, the attempted regulation violates the

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portation agents); *Robertson v. California,* 328 U.S. 440 (1946) (protection of the public from fraud and sharp practices on the part of insurance agents); *Townsend v. Yeomans,* 301 U.S. 441 (1937) (fixing of maximum charges which warehousemen may charge tobacco growers); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960) (control of air pollution).

"long and short haul" principle set forth in the Shreveport Rate Case and recognized in the Interstate Commerce Act. Accordingly, appellees respectfully move this Court to affirm the judgment below in all respects.

Respectfully submitted,

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Supreme Court of [illegible]

October Term, [illegible]

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MORTENSEN, [illegible] A. W. GATOV, WILLIAM STEVENS, JR. and [illegible] HEBERT, as Members thereof,

Appellants,

vs.

SAN FRANCISCO SHIPYARD AND REPAIRING ASSOCIATION, THE CHANTIER, OAK SHIPYARD CORPORATION, ATSON, INC., INDUSTRIAL SHIPYARD ASSOCIATION, UNITED SHIPYARD ASSOCIATION, INC., WORTH DEFENSE COMPANY, THE AMERICAN WELDING INSTITUTE, G. I. TEUCHERT COMPANY, RAILWAY TERMINAL AND WAREHOUSE COMPANY,

Appellees.

On Appeal from the United States District Court for the Northern District of California

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MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. and FRED P. MORRISSEY, as Members thereof,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal from the United States District Court for the Northern District of California

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MOTION TO AFFIRM

Appellees, Baltimore Shippers and Receivers Association, Inc., The Charter Oak Shippers Cooperative Association, Inc., Industrial Shippers Association, Inc., and United Shippers Association, Inc., hereby move to affirm

the judgment of the district court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is reported at 268 F. Supp. 836. A copy of said opinion and the Court's subsequent Judgment and Order are printed in Appendix A to Appellants' Jurisdictional Statement.

JURISDICTION

Appellants seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1253.

STATUTES INVOLVED

Certain of the statutes involved are set forth at pages 3-4 of the Jurisdictional Statement, and Appendices B and C thereto. The remaining statutes involved are sections 2100, 2107-2113, 3668-3670, 4111-4112, and 4140-4144 of the California Public Utilities Code which are contained in Appendix A hereto; and The National Transportation Policy (54 Stat. 899), and sections of The Interstate Commerce Act, 49 U.S.C. §§ 302(a), 302(b), and 304(a)(4a), which are contained in Appendix B hereto.

QUESTIONS PRESENTED

The questions presented by appellants are inaccurate and incomplete. Based upon the decision of the District Court, the questions before this Court fairly may be stated as follows:

1. Whether the Interstate Commerce Act preempts the field of economic rate regulation of interstate motor transportation of property for shippers' associations.

2. Whether the scheme of rate regulation sought to be imposed by appellants violates the Commerce Clause of the Constitution of the United States.

STATEMENT OF THE CASE

Appellees are membership associations of shippers recognized by the Interstate Commerce Act. These associations arrange for the interstate movement of their members' freight, on a non-profit basis, for the purpose of securing economical transportation through volume rates. Utilizing the services of rail and motor carriers operating in interstate commerce, each association arranges for the assembly and consolidation of property, movement of such property, and break-bulk and distribution of the consolidated shipments.

These appellees operate physically in a manner similar to interstate freight forwarders subject to regulation by the Interstate Commerce Commission under 49 U.S.C. §§ 1001-1022. Appellee associations are excluded from regulation under Part IV of the Interstate Commerce Act by virtue of 49 U.S.C. § 1002(c)(1).

As pertinent here, appellee associations arrange for the transportation of property between points in other states and points within the State of California. In order to assemble or distribute this property within California, the associations employ motor carriers operating in interstate commerce. Appellants have established in published tariffs minimum rates, rules and regulations for the transportation of property by motor vehicle between points in California including points within the commercial zones of San Francisco and Los Angeles. The demarcation of such zones is determined by application of federal law and transportation therein is conditionally exempt by virtue of 49 U.S.C. § 303(b)(8).

For a period of at least five years prior to filing of the original complaint, motor carriers employed by the appel-

lee associations in California commercial zones assessed as full compensation for their services charges not related to, and substantially lower than, California minimum rates. Appellants' claim of jurisdiction and attempts to force motor carriers employed by appellee associations to charge no less than California minimum rates for interstate services within commercial zones occasioned the instant action.

On May 6, 1966, these appellees filed a complaint for declaratory judgment and permanent injunction in the United States District Court for the Northern District of California. Appellees maintain that the scheme and program of California rate regulation upon interstate commerce will cause irreparable injury to appellees, will substantially interfere with the conduct of their operations, and will prevent the free flow of commerce between points in other states and points within the State of California.

Appellees requested the District Court to declare (1) that appellants' scheme of rate regulation is inapplicable to interstate motor carrier transportation of property for appellees, and (2) that appellants lack jurisdiction to regulate the rates and charges of motor carriers on interstate transportation of property within California commercial zones. Appellee associations also sought a permanent injunction (1) enjoining the publishing of tariffs applicable to commercial zone interstate transportation of property, (2) enjoining the harassment of, and interference with, the businesses of appellees and motor carriers performing transportation services for them, and (3) enjoining the assertion and enforcement of various penalty provisions under the California Public Utilities Code, *viz.*, *inter alia*, sections 2100, 2107-2113, 3668-3670, 4111-4112, and 4140-4144.

In granting declaratory relief and permanently enjoining enforcement of the California minimum rate regula-

tions the district court held (1) "that the Interstate Commerce Act has pre-empted the field" (268 F.Supp. at 842); and (2) "that even in the absence of pre-emption, the scheme of rate regulation defendants seek to impose violates the Commerce Clause of the United States Constitution" (268 F.Supp. at 844-845).[1]

THE QUESTIONS ARE UNSUBSTANTIAL AND DO NOT WARRANT FURTHER ARGUMENT

Appellants assert eight points in support of their position that the questions are substantial. "Reasons" cited by Appellants in urging this Court to consider the merits of the case have no basis in fact or law. Appellees treat each of these reasons *seriatim.*

1. The meaning and effect of 49 U.S.C. § 303(b)(8) do not present a question of first impression as appellants claim. On at least three occasions[2] this Court has interpreted that section directly, and in a fourth instance[3] affirmed *per curiam* a district court decision construing the section. The lack of more frequent judicial constructions of section 303(b)(8) can be attributed only to its absolute clarity. There is thus no need for this Court to interpret the section once more.

2. Appellants maintain that this appeal presents the question "whether the Commerce Clause prohibits the exercise of regulatory powers of the States with respect to local transportation which Congress has expressly ex-

[1] The Court referred to, but refrained from ruling upon Appellees' challenge to the regulations on Due Process and Equal Protection grounds (268 F.Supp. at 841-842).

[2] *United States* v. *Capital Transit Co.*, 325 U.S. 357, 360-361 (1945); *Morris* v. *McComb*, 332 U.S. 422, 435-437 (1947); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 292 (1949).

[3] *Verbeem* v. *United States*, 154 F.Supp. 431 (E.D.Mich 1957), *aff'd. per curiam sub nom. Amlin* v. *Verbeem*, 356 U.S. 676 (1958).

cluded from federal regulation." Appellants maintain two incorrect premises. First, appellants assume that the transportation involved here is "local." Secondly, they assume that "Congress" excluded commercial zones from regulation. We treat the latter point initially.

Congress has "adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce." *Castle* v. *Hayes Freight Lines*, 348 U.S. 61, 63 (1954). By the commercial zone exemption, 49 U.S.C. § 303(b)(8), Congress relinquished no power to the states. To the contrary, by section 303(b)(8) Congress affirmatively empowered the Interstate Commerce Commission to subject all commercial zones or any one such zone to complete economic regulation at any time upon a finding that the National Transportation Policy requires such action. *Only* the Interstate Commerce Commission has the *power* and the *duty* to remove the commercial zone exemption when that is necessary to promote the efficiency of motor carrier transportation in interstate or foreign commerce. *Charles Noeding Trucking Co.* v. *United States*, 29 F. Supp. 537 (D.N.J. 1939); *Commercial Zones and Terminal Areas*, 62 M.C.C. 151 (1953); *St. Louis, Mo.—East St. Louis, Illinois Commercial Zone*, 61 M.C.C. 489 (1953).

Appellants incorrectly assume that the transportation in question is purely "local transportation." Because the transportation within a California commercial zone such as Los Angeles is merely either the commencing or terminating of freight which is moving or has moved perhaps 3,000 miles in a "continuous flow of commerce," such transportation can hardly be considered "local" in the same sense as a shipment which originates *and* terminates within the Los Angeles commercial zone. The transportation of passengers between rail terminals within the City of Chicago, involved in *Railroad Transfer Service* v. *Chicago*, 386 U.S. 351 (1967), is akin to the transportation in the instant case.

The commercial zone transportation involved here is a federally created concept. To say that commercial zone transportation is local and that transportation outside the zone, but yet within California is not local, is to ignore the realities of the situation. The uncontroverted evidence before the district court established that westbound trailers and boxcars which move across country will arrive in Los Angeles or San Francisco with freight in the same trailer or boxcar that will be destined to points both within and without the commercial zone (Plaintiffs' Exhibit No. 6, pages 5-7; Plaintiffs' Exhibit No. 7, pages 12-14). Transportation outside the commercial zone is subject to full economic regulation by the Interstate Commerce Commission. It is both illogical and harmful to subject the same trailer or boxcar to two masters simultaneously.[4]

Moreover, the evidence adduced at the trial established that the economic regulation at issue portends "widespread" adverse effects "covering a variety of interests throughout the Country and in California." (Transcript, page 31). Nowhere in the testimony did appellants demonstrate that the transportation in question is imbued with a local interest. To the contrary, the evidence conclusively showed that regulation of the commercial zone by California "will impede the free flow of interstate commerce and create a situation which will restrict the ability of interstate shippers to market freely their products within commercial zones." (Transcript, page 33).

Appellants next assert that the question in this case "affects regulation of local transportation of passengers and property in every city of every state in the nation. . . . [including] the regulation of taxicabs and bus lines operating to and from railroad depots, bus terminals, and

[4] See also testimony of witness Norrbom, Plaintiffs' Exhibit No. 1, pages 27-30, for a lucid discussion of the evils of the "dual master" concept in the instant circumstances.

airports." This case, however, does not deal with taxicabs or bus lines, but with the continuous transportation of interstate freight which will be substantially and unreasonably burdened and obstructed as a result of state regulation. Moreover, the retention of jurisdiction over the commercial zone by the Interstate Commerce Commission,[5] and the inability of the states to govern that commercial zone or terminal zone,[6] the two being kindred concepts,[7] are settled matters before this Court.

Appellants next assert, "whether states and cities may lawfully apply uniform, nondiscriminatory regulations to such local service is a question of national importance."[8] The question of uniform, nondiscriminatory regulation is not before this Court, is not a question of law, but one of fact, and therefore not of national importance. Uncontroverted evidence before the district court establishes discriminatory regulation in that "the California minimum rate structure is designed specifically for local intrastate Commerce" and "to compare the services performed by an assembling and distribution carrier with the services performed by a normal intrastate public freight carrier, is to compare unlike operations."[9]

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[5] *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945).

[6] *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949); *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U.S. 351 (1967); *Chicago* v. *Atchison, Topeka & Santa Fe R.R.Co.*, 357 U.S. 77 (1958).

[7] *Sea-Land Service, Inc.* v. *United States*, 222 F.Supp. 558 (D. Del. 1963).

[8] No great danger to state interests appears to be on the horizon if this Court sustains the opinion of the district court inasmuch as the commercial zone exemption has been in existence since 1935 and, at least according to the evidence, no other state has attempted to regulate transportation rates within commercial zones (Deposition of Harrell, Plaintiffs' Exhibit No. 6, page 10).

[9] Plaintiffs' Exhibit No. 1, pages 12-13. For a complete discussion on this point see testimony of witness Norrbom at Plaintiffs' Exhibit No. 1, pages 8-14. As a matter of *fact* the district court made

Assuming *arguendo* that the transportation in question is "local," such a fact would not preclude affirmance by this Court. As to preemption, the question is whether the comprehensive scheme of federal control by the Interstate Commerce Act precludes state interference over the economic aspects of interstate motor transportation. Even appellants do not assert that "local" transportation is an important consideration on the merits of the preemption issue. As to the Commerce Clause issue there are two subsidiary questions, both of which were considered by the district court. First, has California acted in an area in which federal jurisdiction is exclusive and the states cannot interfere at all, and secondly, has California acted properly in an area which, *arguendo*, admits of concurrent jurisdiction? *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204 (1894).

Under the first subsidiary issue the question of "local" transportation or not is immaterial since the crux of the matter regards only the type of regulation sought to be imposed by the state. *State Corporation Commission* v. *Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964), *cert. den.* 380 U.S. 964 (1965); *Railroad Commission of Ohio* v. *Worthington*, 225 U.S. 101 (1912); *Wabash, St. Louis and Pacific R. Co.* v. *Illinois*, 118 U.S. 557 (1886). Under the second subsidiary issue, *i.e.*, where concurrent jurisdiction exists, the balancing of the "local" interest only becomes material when it is first concluded that the state seeks to exercise its police powers over interstate commerce. *State Corporation Commission* v. *Bartlett & Co., Grain, supra; Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959); *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50

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the finding that there was a direct and discriminatory burden on interstate commerce because of violations of the "long and short haul principle," that is, where a motor carrier under California regulation would be forced to charge higher rates for the short haul deliveries within the commercial zone than for the longer haul deliveries outside the commercial zone.

(1922). The district court in this case specifically held that the nature of the regulation involved here is economic and "does not come within the health, safety and welfare, or police power interests which have been recognized to have validity." (268 F.Supp. at 843). Appellants have not questioned the latter finding and thus admit their regulation is economic rather than within their police power. Under those circumstances the question of local interest *vel non* becomes immaterial.

3. Appellants state that "this appeal presents to the Court for the first time the determination of the effect on Section 303(b)(8) of the Interstate Commerce Act of the enactment of sections 1002(c)(1) and 1008 thereof." Appellants then question whether the latter two sections "amend" the former section. Appellants thus attempt to obfuscate the meaning of the district court's decision. That court has not found any "amendments" by subsequent legislation, but has concluded expressly that the comprehensive scheme of regulation under the *entire* Interstate Commerce Act preempts the field. The sections of the Act cited by the district court manifest that comprehensive scheme under federal law. Moreover, the district court had a duty to consider, and did consider the entire Act. It is fundamental that a section of a statute should not be read in isolation from the context of the whole act; and a court should look to the provisions of the whole law, in order to implement its object and policy. *Richards* v. *United States*, 369 U.S. 1 (1962).

4. Appellants here contend that "this appeal presents to the Court for the first time the question of the status of a nonprofit shipper association under section 1002(c)(1) of the Act." Appellants ask, "Is such an association a carrier, or a shipper?" [10] The latter question has already

[10] Appellants also question the district court's discussion regarding the "preferred status" of shippers' associations. It is obvious that associations who are excluded from regulation but yet enjoy the benefits accorded freight forwarders, as under section 1008 of title 49, do in fact enjoy a preferred status.

been answered by appellants since they stipuated that "plaintiff shippers' associations . . . operate as shippers throughout their operations." (Joint Pre-Trial Order in Consolidated Cases, page 19). Moreover, it is incorrect to assert that this Court has before it for the first time the status of nonprofit shippers' associations. Their status and operations were considered by this Court in *United States* v. *Pacific Coast Wholesalers Association*, 338 U.S. 689 (1950), and *Interstate Commerce Commission* v. *Delaware, Lackawanna and Western Railroad Co.*, 220 U.S. 235 (1911).

In the Joint Pre-Trial Order, page 18, Appellants stipulated that "plaintiff shippers' associations operate physically in a manner similar to interstate freight forwarders subject to regulation by the Interstate Commerce Commission. . . ." The status of the freight forwarder and shippers' association is *exactly* the same when each utilizes an assembly and distribution motor carrier serving a California commercial zone. Both are deemed to be shippers when dealing with carriers. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Acme Fast Freight*, 336 U.S. 465 (1949); *Lifschultz* v. *United States*, 144 F.Supp. 606 (S.D.N.Y. 1956).[11]

5. Appellant here argues that the district court misappied the holding of this Court in *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U.S. 351 (1967). The district court cited that case for the proposition that California cannot impose a comprehensive scheme of rate regulation "under the guise of general safety regulations." The latter point was unequivocally confirmed by this Court in *Railroad Transfer* which involved transportation under 49 U.S.C. § 302(c), the "terminal zone exemption." That

[11] These cases apply to freight forwarder status. The stipulation of facts confirms the status of shippers' associations. See also *United States* v. *Pacific Coast Wholesalers Association*, 338 U.S. 689 (1950).

section was specifically added to the Motor Carrier Act because of a technicality in the wording of 49 U.S.C. § 303 (b) (8), the "commercial zone exemption." *Sea-Land Service, Inc.* v. *United States*, 222 F.Supp. 558 (D.Del. 1963). The physical operations in both nature and scope, and treatment by the Interstate Commerce Commission, under either the terminal zone exemption or the commercial zone exemption are exactly the same. *Sea-Land Service, Inc.* v. *United States, supra; Commercial Zones and Terminal Areas*, 46 M.C.C. 665 (1946).

6. Appellants here assert that the district court misapplied the decision in *State Corporation Commission* v. *Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964), *cert. den.* 380 U.S. 964 (1965). Appellants would distinguish the case based upon the different exemptions, namely, the agricultural exemption of 49 U.S.C. § 303 (b) (6), and the commercial zone exemption. The *Bartlett* case, however, did not rise or fall upon the legislative history which the Tenth Circuit indicated was "not free from doubt." The result in *Bartlett* was grounded in (1) the comprehensive regulatory powers of the Interstate Commerce Commission over the transportation of property by truck in interstate commerce, (2) the absence of a valid exercise of police power by the state, and (3) the commercial aims of the regulation in question. Both *Bartlett* and the instant case involve interstate motor transportation within a single state. Both involve an assertion by a state of rate jurisdiction over such transportation. And both involve transportation performed under a federal exemption.[12] The facts in the case at bar demand a stronger

[12] Both cases also involve what Appellants would contend is "local" transportation but which the district court here found not to be local. Additionally, both cases involve, in a technical, statutory sense, transportation which is not performed under "common control, management or other arrangement for the through interstate movement" since separate arrangements for "beyond" transportation are made by the shipper.

application of the law in favor of appellees than the facts in *Bartlett* for two reasons. First, in *Bartlett* there existed a stronger local flavor because of an hiatus in the transportation before the grain moved out of state, whereas here no hiatus exists and the transportation in question is part of a "continuous flow." Secondly, in *Bartlett* the court was dealing with an unconditional or mandatory exemption whereas here the exemption in issue is conditional. Thus the power of Congress or the Interstate Commerce Commission over the commercial zone is greater than over transportation of agricultural commodities. The reasoning in *Bartlett* applies *a fortiori* to the facts now before this Court.

7. Appellants contend here that "the effect of the lower court's decision is to upset and overturn a well established portion of California's regulatory program". The latter assertion is unsupported by the evidence adduced at the trial. For at least five years prior to the filing of the complaint in the instant action, appellants admit that they exercised no jurisdiction (J.S. 6). The stipulated facts show that appellees have been shipping into California commercial zones since 1954 and these appellees have "utilized various motor carriers . . . which have assessed and collected as full compensation for their services assembly and distribution charges which are not related to any minimum rates prescribed by the State of California or to any tariffs on file with the California Commission." (Joint Pre-Trial Order in Consolidated Cases, pages 15-17).

Appellants claim that they have "for over 20 years, fairly and effectively regulated interstate transportation within exempt commercial zones." There is not a scintilla of evidence to establish fair and effective regulation over interstate commerce by California. The uncontroverted evidence before the district court indicates that California did not "fairly" regulate interstate commerce within

commercial zones.[13] Finally, appellants maintain that removal of California jurisdiction "will replace harmony and stability with disruption and confusion." Such an assertion is without support in the record. To the contrary, the evidence sets forth in detail that imposition of California minimum rates would cause wide-spread disruption of appellees' operations and traffic patterns, and that the detrimental effects of such rate regulation "would extend to shippers and receivers of freight scattered over much of the Country". (Transcript, pages 27-29). The conclusion is inescapable that an assertion of *appellants'* jurisdiction would cause disruption and confusion.

8. Appellants here contend that a state law may not be struck down upon a "mere showing" that its administration affects interstate commerce, citing *Head* v. *Board of Examiners*, 374 U.S. 424 (1963). The *Head* case is inapposite to the present situation since that case clearly involved a police power, the court stating, ". . . the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power." *Id.* at 428. Also, in *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), cited by appellants, this Court was dealing with a local regulation designed to achieve safety and protect the health of local citizens. The *Huron* Court held that the air pollution measure was a "police power." In the instant case no proof was adduced which could establish that the rate regulation in question is either directly or indirectly a police power. Appellees' evidence, to the contrary, does in fact establish that the imposition of Cali-

[13] See deposition of witness Norrbom, Plaintiffs' Exhibit No. 1, pages 8-13. Also see testimony of witness Saunders, Transcript, pages 239-249, on the inflated transportation charges which the California Commission has attempted to foist on interstate carriage through the use of their minimum rates.

fornia minimum rates to interstate transportation within the commercial zone is *economic regulation* (Transcript, pages 289-290). Moreover the district court at 268 F. Supp. 842-843 made specific findings that the California regulation was economic and not a police power. Those findings have not been affirmatively attacked by appellants.

THE DISTRICT COURT CORRECTLY FOUND FEDERAL PREEMPTION

Appellants initially argue that the district court erred in finding the legislative history of § 303(b)(8) inconclusive in its consideration of the preemption question. Despite quotations from the Congressional Record taken out of context by appellants, the District Court was correct in finding that there is little or no meaningful legislative history on the commercial zone exemption. In *Amlin* v. *Verbeem*, 356 U.S. 676 (1958), this Court affirmed the decision in *Verbeem* v. *United States*, 154 F. Supp. 431 (E.D.Mich. 1957), where the district court stated with respect to § 303(b)(8) that "there is no significant legislative history of the Motor Carrier Act of 1935 concerning this exemption." (154 F.Supp. at 433).

However, some insight into the history and reasons for the exemption can be gleaned from statements by the Interstate Commerce Commission with respect thereto. In *Commercial Zones and Terminal Areas*, 46 M.C.C. 665 (1946), the federal agency held:

> The partial exemption provided by [49 U.S.C. § 303 (b)(8)] may be removed at any time, as to any particular municipality, upon a finding by this Commission that the application of all provisions to part II of the act to local motor transportation at such municipality is necessary to carry out the *national transportation policy*. . . [T]he Pennsylvania Motor Truck Association, Inc., opposes the further determination

> of commercial zone boundaries, and proposes instead the "abolition of 'exempt' areas and the assumption of regulation therein under the authority of [303 (b) (8)]" presumably by a finding of the type above indicated. *Such action would in our opinion impede, rather than aid, accomplishment of the national transportation policy. Id.* at 678 (Emphasis added).

The action of appellants in this case has the effect of removing all commercial zone exemptions in California. Thus, imposition of California minimum rates is tantamount to making a determination reserved to the federal agency—that removal of commercial zone exemptions in California is required by the National Transportation Policy.

The National Transportation Policy declares that it is federal policy "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. . . ." The determination of these matters is of *national* concern—not local concern. Only the Interstate Commerce Commission is empowered to, or equipped to, delve into these considerations as to interstate transportation. That is, the federal agency *alone* is equipped to perform the balancing function which implementation of the National Transportation Policy, including § 303(b) (8), requires. By definition, the State of California is charged only with protecting its own, as opposed to national interests.

If Congress had intended the states to exercise economic jurisdiction over commercial zones, it would have formulated express provisions therefor. In contrast, 49 U.S.C. § 304(a) (4a) permits the Commission to issue a certificate of exemption to any motor carrier engaged in operation solely within a single state upon a finding that the operation is "in fact of such nature, character, or quantity as not substantially to affect or impair uniform

regulation by the Commission of transportation by motor vehicles engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act." That section goes on to state:

> In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a state to regulate such carrier with respect to the operations covered by such exemption.

The very fact that Congress did not include a provision such as the latter in 49 U.S.C. § 303(b)(8) manifests the absolutely clear proposition that the states may *not* regulate operations of the character described in the commercial zone exemption.[14]

The district court was correct in further supporting its preemption determination by *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U.S. 351 (1967), which construed § 302(c). In its simplest context § 302(c) exempts from federal regulation the operations of a motor carrier serving a terminal area as agent for a regulated railroad, motor carrier or water carrier in transfer, collection or delivery services. On the other hand, the thrust of 303(b)(8) is to exempt a motor carrier serving shippers within the commercial zone *on the same type of service.* In both instances, the exemptions are not mandatory since the Interstate Commerce Commission retains the power to control the § 302(c) operations and the § 303(b)(8) operations.

In the predecessor case to *Railroad Transfer*, *viz.*, *Chicago* v. *Atchison T. & S. F. R. R. Co.*, 357 U.S. 77 (1958), this Court dealing with local regulations over interstate motor transportation under the terminal zone exemption (§ 302(c)) declared (357 U.S. at 86-87):

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[14] The proposition that the state may not step into a commercial zone and control the rates of interstate traffic is fortified by *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945).

> While the Interstate Commerce has not yet adopted special regulations for interstation transfer service it obviously can do so at any time under [49 U.S.C. § 302(c)]. In the meantime many of the Commission's regulations which generally govern railroad transportation apply to this service. And even without Commission action a number of the provisions of the Interstate Commerce Act itself are self-executing in their application.

The *Atchison* Court concluded (357 U.S. at 87-88, emphasis added):

> National rather than local control of interstate railroad transportation has long been the policy of Congress. *It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals.* Serious impediments to the efficient and uninterrupted flow of this traffic might well result. . . .

Because of the similarity of the terminal zone and commercial zone exemptions, the above reasoning by the *Atchison* Court applies with equal force here.

Congress has manifested its intention by the Interstate Commerce Act that the power to regulate the economic aspects of interstate transportation within commercial zones is a power reserved exclusively to the Interstate Commerce Commission to be exercised when and if the federal agency determines that the National Transportation Policy requires the removal of the exemption. The states may not intrude in this reserved field.

In further argument that the District Court erred in finding preemption, appellants maintain that reliance by the court upon *State Corporation Commission* v. *Bartlett*, *supra*, is misplaced and that the lower court erred in utilizing portions of the Freight Forwarder Act to support preemption. Appellees have already considered and answered these contentions in their discussion that the issues

are unsubstantial. Suffice it to say that *Bartlett* is dispositive of the instant case, and the lower court fulfilled its duty to consider and to give effect to all parts of the Interstate Commerce Act in deciding the preemption issue.

THE DISTRICT COURT PROPERLY FOUND COMMERCE CLAUSE VIOLATIONS

The Court ruled as a matter of *Constitutional law* that the subject matter sought to be regulated by California—rates for concededly interstate transportation—is, by virtue of the Commerce Clause alone, exclusively within the federal domain. The Court then ruled as a matter of *fact* that the free flow of commerce guaranteed by the Commerce Clause would be impeded by the California minimum rate regulation even assuming the existence of concurrent federal-state jurisdiction over the transportation here involved. Appellants' Jurisdictional Statement fails to recognize this dual holding, and thus injects confusion where none exists.

As the lower court found, the subject matter involved—rates chargeable for products or services sold in interstate commerce—is of a nature which this Court consistently has found to be exclusively a federal matter.[15]

Thus, the District Court was correct as a matter of law in finding the *Worthington* case, *supra*, dispositive of this issue. In *Worthington*, this Court held (225 U.S. at 107-108, 111):

> It is not necessary to review the cases in this Court which have settled beyond peradventure that the na-

[15] *E.g., Wabash, St. Louis & Pacific R. Co.* v. *Illinois*, 118 U.S. 557, 575 (1886); *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204, 213 (1894); *Railroad Commission of Ohio* v. *Worthington*, 225 U.S. 101, 107-108, 111 (1912); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 292 (1949). See also *State Corporation Commission* v. *Bartlett & Co. Grain*, 338 F.2d 495, 499 (10th Cir. 1964), *cert. den.*, 380 U.S. 964 (1965).

> tional government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well-settled proposition that *over interstate commerce transportation rates the state has no jurisdiction*, and that an attempt to regulate such rates by the state or under its authority is void. . . . And an order made by a state commission under assumed authority of the state which directly burdens or regulates interstate commerce, will be enjoined. (Emphasis added).
>
> * * * *
>
> It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority.

Appellants' attempt to distinguish *Worthington* (J.S. 25-26) is unavailing. If, as appellants urge, that case turned on whether the transportation involved was interstate in nature, the fact that this Court in *Worthington* decided that question affirmatively does not aid appellants. The repeated concession of appellants that the traffic involved in the instant case is interstate in nature merely reinforces the Court's conclusion that *Worthington* controls.

Appellants' statement that this case involves "local" interstate transportation is tantamount to foisting upon this Court an assertion of fact rejected by the Court below. It cannot be overemphasized that the *only* record evidence bearing upon the question whether the transportation is "local" conclusively establishes the contrary. More importantly, the Court specifically held that "local" transportation is *not* involved (268 F.Supp. at 847).

Cases cited by appellants to show that the Commerce Clause "does not prohibit all regulation of interstate commerce by the States" (J.S. 24-25, fns. 7-15) are inapposite. All of such cases relate to various exercises of

state police power intended to protect the health, safety, welfare or morals of the people by protecting them from unsafe highway practices, fraud, polluted air, or *excessive* prices. In direct contrast, in this case, the Court found that the attempted minimum rate regulation is not an exercise of police power, but is commercially and economically motivated. (268 F Supp. at 843) Indeed, to the extent it is relevant, assessments by motor carriers of the higher California minimum rates indisputably would result in higher prices for consumer products since such prices would reflect increased transportation costs. Consumers within and without California would bear the burden of such increased prices.

Other cases cited by appellants [16] were distinguished effectively by the lower court as involving matters of a "purely local nature." (268 F.Supp. at 847). The "local concern doctrine" raised by appellants is inapplicable to this case, since the subject matter involved is exclusively national in scope and does not admit of concurrent state-federal jurisdiction. *Freeman* v. *Hewit*, 329 U.S. 249 (1946); *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Public Utilities Commission of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

Appellants would have this Court upset the judgment below on the asserted ground that the lower court found only that "California's minimum rates . . . would increase transportation costs to non-profit shipper associations" (J.S. 27), and that such a finding cannot sustain the conclusion that the minimum rates place an undue burden upon interstate commerce. This contention underscores appellants' misunderstanding of the lower court's decision.

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[16] *Cooley* v. *Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851); *Port Richmond & Bergen Point Ferry Co.* v. *Board of Freeholders*, 234 U.S. 317 (1914); *Wilmington Transportation Co.* v. *Railroad Commission*, 236 U.S. 151 (1915).

The court did, in fact, find that transportation costs would increase, but projected this finding into the inescapable conclusion that "the increase in costs would result in a drying up of some of the traffic and an impairment of the ability of some out-of-state producers to compete in the California market" (268 F.Supp. at 846). The court further found that "the California regulation would impose a trade barrier by artificially impairing the ability of producers in other states to compete with those in California" (268 F.Supp. at 846) In addition, the Court stated (268 F.Supp. at 843):

> It is clear that forcing plaintiff motor carriers to charge higher rates to plaintiff nonprofit shippers results in some competitive advantage to local manufacturers and producers of goods by increasing the costs to distant sellers in the marketing of their goods in California commercial zones.

These findings were based upon evidentiary *facts* which the court found were "nowhere effectively rebutted" (268 F.Supp. at 846). There can be no question, therefore, that such an impediment to the free flow of commerce safeguarded by the Commerce Clause runs afoul of that Clause, and must fall. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959); *Tupman Thurlow Co.* v. *Moss*, 252 F.Supp. 641 (M.D.Tenn. 1966); *Ness Produce Co.* v. *Short*, 263 F. Supp. 586 (D. Ore. 1966); *Chicago, Rock Island & Pacific R. R. Co.* v. *Hardin*, 274 F.Supp. 294 (W.D.Ark. 1967).

As stated *supra*, the lower court found that "local" transportation is not involved in the instant case. Assuming *arguendo* that local transportation is involved, the California minimum rate structure still contravenes the Commerce Clause. The lower Court determined that the regulations erected a trade barrier against out-of-state products. This Court has decided uniformly that all state action, which though nominally of local concern, is in point

of fact aimed at interstate commerce, or which, by its necessary operation is a means of gaining local advantage by casting its attendant burdens on those without the state is violative of the Commerce Clause. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964). See also *International Packers Ltd.* v. *Hughes*, 271 F.Supp. 431 (S.D. Iowa 1967).

In attempting to disparage the district court's reliance upon *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50 (1922), appellants state that the *Lemke* case "involved the regulation of the sale of a commodity—grain—and had nothing to do with safety" (J.S. 27-28). We agree. Appellants have conceded the very reason the decision below must be affirmed.

Of equal significance is a predicate for the court's decision that appellants' failed to attack. The court found as a matter of *fact* that an undue burden would be placed upon interstate commerce by the minimum rates because of the discrimination against interstate commerce resulting from uncontroverted violations of the "long and short haul principle." At 268 F.Supp. 845-846 the Court ruled:

> The testimony of Mr. Norrbom indicates and the defendants' expert, Mr. Lane, agrees that instances would occur under the California tariffs where a motor carrier delivering goods from within a commercial zone would be forced to charge higher rates for the short haul deliveries within the commercial zone than for longer haul deliveries along the same route but outside of the commercial zone. (Deposition of Norrbom, pp. 27-30, Transcript, p. 630.) In the latter situation involving longer haul deliveries along the same route but outside the commercial zone, it is clear that the state is prohibited from regulation by the Motor Carrier Act. This amounts to a direct and discriminatory burden on interstate commerce.

Appellants' silence upon this aspect of the Court's decision can be taken only as a concession of its correctness. In any event, such discrimination clearly violates the Commerce Clause. *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

CONCLUSION

The decision of the district court is correct. Resting upon sound findings of fact and conclusions of law, the decision does not involve issues which merit further argument before this Court. Therefore, the decision should be affirmed.

Respectfully submitted,

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APPENDIX A

CALIFORNIA PUBLIC UTILITIES CODE:

Chapter II. Violations

§ 2100. *Undercharges; collection; fine; cumulative remedy*

Whenever the commission, after a hearing, finds that any common carrier, other than a railroad corporation, has charged, collected, or received, a lesser compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges, specified in its tariff schedules filed and in effect at the time, or that such carrier has refunded or remitted in any manner or by any device any portion of the rates, fares, or charges so specified without an order of the commission so authorizing, the commission shall require the carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges. All such fines shall be paid into the State Treasury to the credit of the General Fund. The remedy and penalty provided by this section shall be cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this part, or to the exercise by the commission of its power to punish for contempt. (Added Stats. 1963, c. 1877, p. 3861, § 1.)

* * * *

§ 2107. *Residuary penalty*

Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars

($2,000) for each offense. (Stats. 1951, c. 764, p. 2098, § 2107.)

§ 2108. *Separate offense for each day*

Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. (Stats. 1951, c. 764, p. 2098, § 2108.)

§ 2109. *Imputed violations*

In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility. (Stats. 1951, c. 764, p. 2098, § 2109.)

§ 2110. *Violation by officer, agent, or employee of public utility; misdemeanor; penalty*

Every public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. (As amended Stats. 1967, c. 520, p. —, § 1.)

§ 2111. *Penalty for violations by persons or corporations not a public utility*

Every corporation or person, other than a public utility and its officers, agents, or employees, which or who knowingly violates or fails to comply with, or procures, aids or abets any violation of any provision of the Constitution of this state relating to public utilities or of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such corporation or person, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense. (As amended Stats. 1967, c. 838, p. —, § 1.)

§ 2112. *Violation by officer, agent, or employee of corporation not a public utility; misdemeanor; penalty*

Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. (Stats. 1951, c. 764, p. 2099, § 2112.)

§ 2113. *Contempt of commission*

Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regu-

lation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto. (Stats. 1951, c. 764, p. 2099, § 2113.)

* * * *

Article 6. Rates

§ 3668. *Evasion by carrier*

No highway permit carrier, or any officer, or agent thereof, or any person acting or employed by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or by any other device, assist, suffer, or permit any corporation or person to obtain transportation for any property between points within this State at rates less than the minimum rates or more than the maximum rates then established or approved by the commission. (Stats. 1951, c. 764, p. 2119, § 3668.)

§ 3669. *Evasion by others*

No person, corporation, or any officer, agent, or employee of a corporation shall, by means of false billing, false or incorrect classification, false weight or weighing, false representation as to the content or substance of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of a highway permit carrier, or any of its officers, agents, or employees, seek to obtain or obtain transportation for property at less than the minimum rates or charges or more than the maximum rates or charges established or approved by the commission. (Stats. 1951, c. 764, p. 2119, § 3669.)

§ 3670. *False allowance, rebate, or payment for damage*

No person or corporation, or any officer, agent, or employee of a corporation, shall knowingly, directly or indirectly by any false statement or representation as to cost or value or the nature or extent of damage, or by the use of any false billing, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, or upon any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, rebate, or payment for damage in connection with or growing out of the transportation of property, or an agreement to transport property, whether with or without the consent or connivance of a highway permit carrier, or any of its officers, agents, or employees. No highway permit carrier, or any of its officers, agents, or employees, shall knowingly pay, or offer to pay any such allowance, rebate, or claim for damage. (Stats. 1951, c. 764, p. 2119, § 3670.)

* * * *

Article 7

Suspension and Revocation of Permits

§ 4111. *Suspension on request of carrier*

The commission may, at the request of any carrier, suspend the operating permit of the carrier for a definite time during which it is unlawful for the carrier to conduct any operations as a carrier. (Stats. 1951, c. 764, p. 2133, § 4111.)

§ 4112. *Grounds for cancellation, revocation and suspension; fine*

The commission may cancel, revoke, or suspend the operating permit or permits of any carrier upon any of the following grounds.

(a) Any illegally conducted highway carrier operations.

(b) The violation of any of the provisions of this chapter, or of any operating permit issued thereunder.

(c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter.

(d) The conviction of the carrier of any misdemeanor under this chapter.

(e) The rendition of a judgment for any penalty imposed under this chapter.

(f) The failure of a carrier to pay any fee imposed upon the carrier within the time required by law.

As an alternative to the cancellation, revocation, or suspension of an operating permit or permits, the commission may impose upon the holder of such permit or permits a fine of not exceeding five thousand dollars ($5,000). All fines collected shall be deposited at least once each month in the State Treasury to the credit of the General Fund. (As amended Stats. 1961, c. 1444, p. 3291, § 3.)

* * * *

Article 8. Fines and Penalties

§ 4140. *Undercharges; collection; fine; cumulative remedy*

Whenever the commission, after a hearing, finds that any carrier has charged, collected, or received for the transportation of property, or for any service in connection therewith, rates or charges less than the minimum rates and charges applicable to such transportation established or approved by the commission, or has directly or indirectly refunded or remitted in any manner or by any device any portion of such minimum rates or charges, or has paid a commission, without an order of the commis-

sion so authorizing, the commission shall require such carrier to collect the undercharges involved and may impose upon the carrier a fine equal to the amount of such undercharges. All such fines shall be paid into the State Treasury to the credit of the General Fund. The remedy and penalty provided by this section are cumulative and shall not be a bar to or affect any other remedy or penalty provided for in this chapter, or to the exercise by the commission of its power to punish for contempt. (Added Stats. 1963, c. 1877, p. 3863, § 5.)

§ 4141. *Violation by carrier, officer, or agent; misdemeanor; penalty*

Every carrier and every officer, director, agent, or employee of any carrier who violates or who fails to comply with, or who procures, aids, or abets any violation by any such carrier of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit issued to any carrier, or who procures, aids, or abets any carrier in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit, is guilty of a misdemeanor, and is punishable by fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both. (Stats. 1951, c. 764, p. 2133, § 4141; Stats. 1955, c. 1518, p. 2796, § 1.)

§ 4142. *Violation by others; misdemeanor; penalty*

Every corporation or person other than a carrier, who knowingly and wilfully, either individually, or acting as an officer, agent, or employee of a corporation, copartnership, or any other person other than a carrier, violates any provision of this chapter or fails to observe, obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or who

procures, aids, or abets any carrier in its violation of this chapter, or in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, or requirement, is guilty of a misdemeanor, and is punishable by fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than three months, or both. (Stats. 1951, c. 764, p. 2133, § 4142.)

§ 4143. *Violation by carrier, officer, or employee; penalty*

Every carrier and every officer, director, agent, or employee of any carrier who violates or who fails to comply with, or who procures, aids, or abets, any violation by any such carrier of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit issued to any carrier, or who procures, aids, or abets any carrier in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit, is subject to a penalty of not more than five hundred dollars ($500) for each offense. (Stats. 1951, c. 764, p. 2134, § 4143.)

§ 4144. *Violation by others; penalty*

Every corporation or person other than a carrier who knowingly and wilfully, either individually, or acting as an officer, agent, or employee of a corporation, copartnership, or any other person other than a carrier, violates any provision of this chapter or fails to observe, obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or who procures, aids, or abets any carrier in its violation of this chapter, or in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, or requirement, is subject to a penalty of not more than five hundred dollars ($500) for each offense. (Stats. 1951, c. 764, p. 2134, § 4144.)

APPENDIX B

Interstate Commerce Act, as amended, 49 U.S.C. § 1, *et seq.*:

National Transportation Policy (54 Stat. 899 [preceding 49 U.S.C. § 1] (1940)):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

§ 302. *Application of provisions*

(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such trans-

portation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission.

(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

* * * *

§ 304. *Powers and duties of Commission—Powers and duties generally*

(a) It shall be the duty of the Commission—

* * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part

thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this chapter beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by

such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

ME COURT, U. S.

In the Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
JAN 10 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. and FRED P. MORRISSEY, as Members thereof,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief Opposing Motion to Affirm

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Brief Opposing Motion to Affirm

This brief is filed in opposition to appellees' Motion to Affirm pursuant to Rule 16, paragraph 4 of the Rules of the Supreme Court of the United States.

Appellees have not squarely met the basic issue involved in this case, that is, whether the states have the power to regulate interstate transporation which has been specifically exempted from federal regulation. Again, it cannot be emphasized too strongly that Congress in enacting 49 U.S.C. 303(b)(8) intended to leave regulation of commercial zone transportation to the States. The statement of Senator Wheeler, who introduced the bill containing Section 303(b)(8) can lead to no other conclusion. Senator Wheeler stated:

> "Furthermore, an exemption is made *unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property, locally* or between contiguous municipalities or commercial zones, as between New York and New Jersey, and also, for instance, as between Washington and Alexandria, and other contiguous cities *where the transportation is regulated by the local governments themselves.*" 79 Cong. Rec. Part 5, p. 5650 (Emphasis added).

Appellees contend that commercial zone transportation was intended to be regulated only, if at all, by the Interstate Commerce Commission. The above quote dispels any such intention.

Secondly, appellees must be contending that *State Corporation v. Bartlett,* 338 F.2d 495, cert. den. 380 U.S. 964 (1964) stands for the proposition that any state regulation, in any circumstances whatsover, of interstate transportation rates has *per se* "commercial aims" and it is thus prohibited. This court has never made any such statement. Just what the term "commercial aims" means or how it should apply in an area which Congress has specifically left to state regulation is not explained.

In the circumstances, the *Bartlett* case should not be controlling here because of the obvious differences between the purposes of the agricultural exemption in 49 U.S.C. 303(b)(6) and the commercial zone exemption in 49 U.S.C. 303(b)(8), and their respective legislative histories.

The Court should not allow such arguments to persuade it to dispose of this appeal without plenary consideration. That the issues are of national importance is obviously conceded by the appellees.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

PUBLIC UTILITIES COMM'N OF CALIFORNIA ET AL. *v.* BALTIMORE SHIPPERS & RECEIVERS ASSN., INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 846. Decided January 15, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.